APPENDIX A

PAUL J. FROMMERT, ALAN H. CLAIR, DONALD S. FOOTE, THOMAS I. BARNES, RONALD J. CAMPBELL, FRANK D. COMMESSO, WILLIAM F. COONS, JAMES D. GAGNIER, BRIAN L. GAITA, WILLIAM J. LADUE, GERALD A. LEONARDO JR., FRANK MAWDESLEY, HAROLD S. MITCHELL, WALTER J. PETROFF, RICHARD C. SPRING, PATRICIA M. JOHNSON, F. PATRICIA M. TOBIN, NANCY A. REVELLA, ANATOLI G. PUSCHKIN, WILLIAM R. PLUMMER, MICHAEL J. MCCOY, LARRY J. GALLAGHER, NAPOLEON B. BARBOSA, ALEXANDRA SPEARMAN HARRICK, JANIS A. EDELMAN, PATRICIA H. JOHNSTON, KENNETH P. PARNETT, JOYCE D. CATHCART, FLOYD SWAIM, JULIE A. MCMILLIAN, DENNIS E. BAINES, RUBY JEAN MURPHY, MATTHEW D. ALFIERI, KATHY FAY THOMPSON, MARY BETH ALLEN, CRAIG R. SPENCER, LINDA S. BOURQUE, THOMAS MICHAEL VASTA, FRANK C. DARLING, CLARK C. DINGMAN, CAROL E. GANNON, JOSEPH E. WRIGHT, DAVID M. ROHAN, DAVID B. RUDDOCK, CHARLES HOBBS, CHARLES ZABINSKI, CHARLES J. MADDALOZZO, JOYCE M. PRUETT, WILLIAM A. CRAVEN, MAUREEN A. LOUGHLIN JONES, KENNETH W. PIETROWSKI, BONNIE COHEN, LAWRENCE R. HOLLAND, GAIL A. NASMAN, STEVEN D. BARLEY, DONNA S. LIPARI, ANDREW C. MATTELIANO, MICHAEL HORROCKS, CANDICE J. WHITE, DENNIS E. BAINS, KATHLEEN E. HUNTER, JOHN L. CRISAFULLI, DEBORAH J. DAVIS, BRENDA H. MCCONNELL, KATHLEEN A. BOWEN, ROBERT P. CARANDDO, TERENCE J. KURTZ, WILLIAM J. CHESLOCK, THOMAS E. DALTON, LYNN BARNSDALE, BRUCE D. CRAIG, GARY P. HARDIN, CLAUDETTE M. LONG, DALE PLATTETER, MARY ANN SERGEANT, MOLLY WHITE KEHOE, IRSHAD QUERSHI, DAVID K. YOUNG, LESLIE ANN WUNSCH, EUGENE H.

UPDYKE, MICHAEL R. BENSON, ALVIN M. ADAMS, RONNIE KOLNIAK, JAMES J. FARRELL, ROBERT L. BRACKHAHN, BENJAMIN C. ROTH, RICHARD C. CARTER, CARMEN J. SOFIA, KATHLEEN W. LEVEA, FREDERICK SCACCHITTI, PAUL DEFINA, JAMES G. WALLS, GAIL J. LEVY, JOHN A. WILLIAMS, CRYSTAL THORTON, CHARLES R. DRANNBAUER, WILLIAM M. BURRITT, and JANICE ROSS HEILER, Plaintiffs-Appellees, -v.- SALLY L. CONKRIGHT, XEROX CORPORATION PENSION PLAN ADMINISTRATOR, PATRICIA M. NAZEMETZ, XEROX CORPORATION PENSION PLAN ADMINISTRATOR, LAWRENCE M. BECKER, XEROX CORPORATION PLAN ADMINISTRATOR, XEROX CORPORATION RETIREMENT INCOME GUARANTEE PLAN, and XEROX CORPORATION, A NEW YORK CORPORATION, Defendants-Appellants, XEROX CORPORATION, Defendant.

Docket No. 07-0418-cv

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

535 F.3d 111; 2008 U.S. App. LEXIS 15585; 44 Employee Benefits Cas. (BNA) 1461

June 19, 2008, Argued
July 24, 2008, Decided

PRIOR HISTORY: [**1]

Appeal from a January 24, 2007 order of the United States District Court for the Western District of New York (David G. Larimer, Judge) complying with our January 6, 2006 decision to remand the case to the District Court in order to craft a remedy to calculate Plaintiffs-Appellees' pension benefits in light of the violations we identified of the Employee Retirement

Income Security Act of 1974, *29 U.S.C. § 1001 et seq.* We conclude that the District Court crafted a remedy consistent with our decision, applicable law, and the terms of the pension plan at issue. However, we also conclude that the District Court erred in refusing to enforce the release forms signed by several Plaintiffs-Appellees in this litigation.
Frommert v. Conkright, 472 F. Supp. 2d 452, 2007 U.S. Dist. LEXIS 5044 (W.D.N.Y., 2007)

DISPOSITION: Affirmed in part, vacated in part, and remanded for further proceedings consistent with this opinion.

COUNSEL: ROBERT H. JAFFE (Mark B. Watson, Robert H. Jaffe & Associates, Springfield, New Jersey; George A. Schell, Schell & Schell, Fairport, New York; John A. Strain, Rodondo Beach, California, on the brief), Robert H. Jaffe & Associates, Springfield, New Jersey, for Plaintiffs-Appellees.

BRENDAN S. MAHER, Stris & Maher LLP, Dallas, Texas, for Plaintiffs-Appellees.

MARGARET A. CLEMENS, [**2] Nixon Peabody LLP, Rochester, New York, for Defendants-Appellants.

Maria Ghazal, Business Roundtable, Washington, D.C.; Jeffrey A. Lamken, Rachel M. McKenzie, Baker Botts LLP, Washington, D.C.; Allyson N. Ho, Baker Botts LLP, Dallas, Texas, for Amicus Curiae Business Roundtable.

JUDGES: Before: STRAUB and RAGGI, Circuit Judges, and SESSIONS, District Judge.*

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*The Honorable William K. Sessions III, Chief Judge of the United States District Court for the District of Vermont, sitting by designation.

OPINION BY: STRAUB
OPINION

[*115] STRAUB, Circuit Judge:

Plaintiffs-Appellees asserted claims under the Employee Retirement Income Security Act of 1974 ("ERISA"), *29 U.S.C. § 1001 et seq.*, against their current or former employer, Xerox Corporation ("Xerox"),1 the pension plan administered for the benefit of its employees, and various individuals associated with the administration of that plan. On remand from our first decision in this litigation, *see Frommert v. Conkright, 433 F.3d 254 (2d Cir. 2006)*, the District Court crafted a remedy to address the ERISA violations we had identified and concluded that the release forms signed by several Plaintiffs-Appellees did not bar their ERISA claims, *see Frommert v. Conkright, 472 F. Supp. 2d 452, 456-59 (W.D.N.Y. 2007)*. [**3] Defendants-Appellants challenge both aspects of the District Court's decision. For the reasons set forth below, we reject Defendants-Appellants' first challenge and agree with the second. Accordingly, we vacate a portion of the District Court's order and remand the case to the District Court for proceedings consistent with this opinion. 1 Early in this litigation, the District Court dismissed Xerox as a party, and Plaintiffs-Appellees did not challenge this dismissal in their appeal. *See Frommert v. Conkright, 433 F.3d 254, 256 n.2 (2d Cir. 2006)*.

FACTUAL AND PROCEDURAL BACKGROUND

We presume familiarity with the facts and procedural history of this case as set forth in our prior decision, *see Frommert, 433 F.3d at 257-62*, and we repeat them here only as relevant to the issues presented in this appeal. In that decision, we concluded that Defendants-Appellants had impermissibly amended the ERISA plan at issue through their method of determining retirement benefits for those beneficiaries who had previously left

the company only to be rehired later. *Id. at 264-68.* When these beneficiaries left Xerox, they all received lump-sum distributions of their then-accrued pension benefits. *Id. at 257.*

The [**4] pension benefits of those who were subsequently rehired by Xerox were governed by a set of ambiguous provisions in the pension plan documents. The 1989 Xerox Retirement Income Guarantee Plan ("RIGP" or "Plan") provided that, "[i]n the event any part or all of a Member's accrued benefit is distributed to him prior to his Normal Retirement Date, . . . and such member at any time thereafter recommences active participation in the Plan, the accrued benefit of such Member based on all Years of Participation shall be offset by the accrued benefit attributable to such distribution." 1989 RIGP § 9.6. The 1997 version of the Plan provided both that "[n]o credit shall be given [to a participating employee] for any period with respect to which a lump sum payment has been made . . ." and that "Credit for Years of Participation preceding [such a payout] will be reinstated" in the event that such an employee returns to Xerox." *Frommert, 433 F.3d at 260.* Thus, in determining these employees' benefits, the plan administrator was required to account, in a manner unspecified to employees, for both an employee's total years of service at Xerox and the fact that the final benefits must be "offset by" [**5] an amount "attributable" to a prior lump sum distribution.

The plan administrator resolved this difficulty by utilizing a so-called "phantom account" offset mechanism. The phrase "phantom account" refers to the calculation of the current value of the employee's prior, lump-sum distribution by adjusting that amount for "hypothetical investment gains and/or losses attributable to the prior distribution, as if the money had been [*116] left in [the employee's] account[]" instead of being distributed to the employee upon first leaving Xerox. *Id. at 259* (quoting 1995 "Benefits Update"). In estimating the pension benefit to which

that employee would be entitled upon his or her future retirement (and thus second separation) from Xerox employment, the plan administrator would both account for the employee's total years of service and deduct an amount based on the prior, lump-sum distribution, as augmented by the "phantom account" offset method. *See id. at 259-61.*

In our first decision, we concluded that the "phantom account" offset mechanism constituted a "retroactive cut-back" of anticipated pension benefits in violation of *29 U.S.C. § 1054(g)*, and that Defendants-Appellants had impermissibly amended [**6] the ERISA Plan to include that mechanism in violation of *29 U.S.C. § 1054(h)*. *See id. at 266-68.* We remanded to the District Court to fashion a remedy for these violations. *See id. at 268.* Specifically, we instructed the District Court as follows:

> On remand, the remedy crafted by the district court for those employees rehired prior to 1998 should utilize an appropriate pre-amendment calculation to determine their benefits. We recognize the difficulty that this task poses because of the ambiguous manner in which the pre-amendment terms of the Plan described how prior distributions were to be treated. As guidance for the district court, we suggest that it may wish to employ equitable principles when determining the appropriate calculation and fashioning the appropriate remedy.

Id. In addition, we recognized that the District Court could apply the "phantom account" offset mechanism to employees hired after the 1998 amendment to the Plan because those individuals were on notice as to the mechanism's existence. *Id. at 268-69. But see Miller v. Xerox Corp. Retirement Income Guarantee Plan, 464 F.3d 871 (9th Cir. 2006)* (holding that Plan's "phantom

account" methodology itself violates ERISA), [**7] *cert. denied, 127 S. Ct. 1829, 167 L. Ed. 2d 321 (2007).*

Acknowledging our guidance to employ "equitable principles" and reviewing the language of the Plan materials, the District Court concluded that the appropriate remedy for employees hired before the 1998 amendment was to direct the plan administrator to pay each of these individuals "a lump sum in the amount of the difference between the amount of benefits that [an employee] has received, and the amount of the recalculated benefit, without any consideration of a 'phantom account.'[1] *Frommert, 472 F. Supp. 2d at 458* (internal quotation marks omitted). The District Court also stated that "it would not be unreasonable for the administrator to subtract out the amount of the prior distribution" in order to prevent such employees from receiving windfalls. *Id.* (alterations and internal quotation marks omitted).

In addition, the District Court concluded that [**8] the release forms signed by several Plaintiffs-Appellees in exchange for their receiving severance pay from Xerox did not release Defendants-Appellants from the ERISA-based claims asserted in this litigation. *See id. at 460-65.* Other matters addressed by the District Court on remand are not relevant to this appeal, which timely followed.

[*117] DISCUSSION

On appeal, Defendants-Appellants raise two challenges to the District Court's decision. First,

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[1] The District Court presumed that the parties would be able to agree on which employees had full notice of the "phantom account offset" mechanism because they were rehired after the 1998 Summary Plan Description ("SPD") had been issued. *See Frommert v. Conkright, 472 F. Supp. 2d 452, 459 (W.D.N.Y. 2007).*

Defendants-Appellants argue that the District Court fashioned an improper remedy for the ERISA violation associated with the implementation of the "phantom account offset" mechanism. Second, Defendants-Appellants argue that the District Court erroneously decided that the release forms signed by certain Plaintiffs-Appellees did not bar their ERISA-based claims. For the reasons that follow, we agree with Defendants-Appellants that the release forms at issue bar the signatories' ERISA claims, but we will not disturb the District Court's chosen remedy.

I. Remedy

On appeal, Defendants-Appellants challenge the District Court's remedy for the ERISA violations we identified in our prior decision, *i.e.*, the impermissible amendment of the ERISA plan at issue [**9] to calculate Plaintiffs-Appellees' pension benefits according to a "phantom account" offset method. As discussed above, we instructed the District Court as follows:

> On remand, the remedy crafted by the district court for those employees rehired prior to 1998 should utilize an appropriate pre-amendment calculation to determine their benefits. We recognize the difficulty that this task poses because of the ambiguous manner in which the pre-amendment terms of the Plan described how prior distributions were to be treated. As guidance for the district court, we suggest that it may wish to employ equitable principles when determining the appropriate calculation and fashioning the appropriate remedy.

Frommert, 433 F.3d at 268. We review a district court's chosen remedy of an identified ERISA violation

for an excess of allowable discretion. *See Chao v. Merino, 452 F.3d 174, 185 (2d Cir. 2006).*

Here, the Plan accounts for a retiring employee's total years of working at Xerox, but it also provides that an employee's benefits must "be offset by the accrued benefit attributable to [a prior distribution]." RIGP § 9.6. Plaintiffs-Appellees all received earlier, lump-sum distributions of their pension [**10] benefits when they first left their employment at Xerox, and the basic question presented to the District Court was how to ensure that these individuals received their due benefits in light of the ambiguous non-duplication of benefits provision. *See Frommert, 472 F. Supp. 2d at 457-58* (construing and applying § 9.6 of 1989 Plan). On remand, the District Court decided that the appropriate remedy was to order the plan administrator to recalculate the relevant Plaintiffs-Appellees' benefits to deduct only the nominal value of their prior, lump-sum distributions, *i.e.,* without a "phantom account" adjustment reflecting hypothetical investment gains or, apparently, any other adjustment to reflect the inflation-adjusted values of the prior distributions. *See id. at 458-59.*

Defendants-Appellants fail to establish that the District Court's approach violated either the Plan terms or any law. Although Defendants-Appellants contend that the District Court failed to utilize pre-1998 Plan terms, the District Court explicitly did so but simply applied those terms to Plaintiffs-Appellees differently than Defendants-Appellants proposed. In advocating their proposed "new hire" approach instead of the [**11] remedy crafted by the District Court, Defendants-Appellants argue that § 1.44(f) of the 1989 Plan requires that a rehired employee who then retires is entitled only to a pension benefit that accounts for his or her years of service [*118] since being rehired; the prior years of service are relevant only for the purpose of "vesting." However, in advocating this "new hire" method, Defendants-Appellants ignore the terms

of the 1989 Plan, which is silent as to prior lump-sum distributions pursuant to § 8.2. To the extent that the 1997 Plan applies to certain Plaintiffs-Appellees, Defendants-Appellants ignore the language of § 1.45(f). *See Frommert, 433 F.3d at 258-60* (discussing such provisions in the various versions of the Plan). Defendants-Appellants have failed to demonstrate that the District Court exceeded its allowable discretion in crafting its chosen remedy instead of adopting Defendants-Appellants' proposed approach.[2]

Alternatively, Defendants-Appellants contend that the District Court erred by failing to adopt the remedy proposed by the plan administrator or, at least, by failing to remand to the administrator the task of fashioning a remedy. Regarding the failure of the District Court to remand to the plan administrator, it does not appear from the record that Defendants-Appellants actually requested such relief from the District Court. As such, they have waived the issue for appeal. *See Allianz Ins. Co. v. Lerner, 416 F.3d 109, 114 (2d Cir. 2005)* ("It is a well-established general rule that an appellate court will not consider an issue

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[2] Defendants-Appellants also argue that the District Court's remedy confers a "windfall" on Plaintiffs-Appellees in violation of equitable principles. *See, e.g., Prudential Ins. Co. v. S. S. American Lancer, 870 F.2d 867, 871 (2d Cir. 1989)* ("[E]quity, we believe, abhors [**12] a windfall."). However, in contrast to *Prudential Insurance*, we do not view the remedy crafted by the District Court to be "wholly unjust" here because Defendants-Appellants wrote the terms of the ERISA Plan in an ambiguous and occasionally self-contradictory fashion. *Cf. Lifson v. INA Life Ins. Co. of N.Y., 333 F.3d 349, 353 (2d Cir. 2003)* (per curiam) (noting that, in interpreting an ERISA plan, a court "construe[s] ambiguities against the drafter and in favor of the beneficiary").

raised for the first time on appeal." (alterations and internal quotation marks [**13] omitted)).

Even if Defendants-Appellants had not waived the remand issue, we would review the District Court's decision to fashion a remedy itself instead of remanding to the plan administrator for an excess of allowable discretion. *See Zervos v. Verizon N. Y., Inc., 277 F.3d 635, 648 (2d Cir. 2002); Kinek v. Paramount Commc'ns, Inc., 22 F.3d 503, 508 (2d Cir. 1994).* The District Court here did not exceed its allowable discretion in this regard. Although we did not prohibit the District Court from remanding the case to the plan administrator, the language in our prior opinion presumed that the District Court would craft the remedy itself. *See Frommert, 433 F.3d at 268.*

Moreover, Defendants-Appellants had ample opportunity to explain fully the approach proposed by the plan administrator before the District Court, and did so, in their briefs and at oral argument, in a sworn affidavit from the plan administrator, and in a written report and accompanying testimony from an independent actuary who analyzed the plan administrator's approach. Indeed, Defendants-Appellants identify nothing that might have been gained by the District Court's remanding the matter to the plan administrator. *See Krauss v. Oxford Health Plans, Inc., 517 F.3d 614, 630 (2d Cir. 2008)* [**14] (stating that plaintiffs were not entitled to administrative remand where doing so would have been "futile"); *Miller v. United Welfare Fund, 72 F.3d 1066, 1071 (2d Cir. 1995)* (stating that remand to a plan administrator is not required where such additional proceedings would be a "useless formality" (internal quotation marks omitted)). In addition, we suggested, as "guidance for [*119] the district court," that it "may wish to employ equitable principles." *See Frommert, 433 F.3d at 268.* Defendants-Appellants identify no equitable principles that a district court might be employing, immediately upon remand from a circuit court, in merely performing the ministerial

function of then remanding a case to an ERISA plan administrator.

Defendants-Appellants rely on *Miller v. United Welfare Fund* to argue that remand is appropriate when "reasonable minds could differ as to the outcome of the case." However, we directed the district court in *Miller* to remand the case to the plan administrator to permit the plan administrator to gather additional evidence relevant to the nursing care sought by the claimant. *See id.* Here, we did not anticipate any comparable, extensive fact finding, and none occurred on [**15] remand before the District Court. Indeed, the only "evidence" considered by the District Court consisted of expert testimony regarding which of various proposed remedies was the most fair and equitable. Given the apparent lack of any benefit to remanding the case to the plan administrator and the language in our prior decision implying that the District Court should fashion its own remedy, *see id. at 268-69*, we cannot conclude that the District Court exceeded its allowable discretion in actually doing so.

In the alternative, Defendants-Appellants argue that the District Court erred in failing to adopt the plan administrator's proposed approach, or at least consider it under a deferential standard of review. We have held that where the ERISA plan confers upon the plan administrator discretionary authority to "construe the terms of the plan," the district court should review a decision by the plan administrator under an excess of allowable discretion standard. *See Nichols v. Prudential Ins. Co. of Am., 406 F.3d 98, 108 (2d Cir. 2005)* (citing *Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 115, 109 S. Ct. 948, 103 L. Ed. 2d 80 (1989)).* However, the District Court here had no decision to review because the plan administrator [**16] never rendered any decision other than the original benefit determinations, all of which were premised on the now impermissible "phantom account" offset mechanism. *See id. ("[W]e* may give deferential review only to actual exercises of discretion.").

Defendants-Appellants have identified no authority in support of the proposition that a district court must afford deference to the mere *opinion* of the plan administrator in a case, such as this, where the administrator had previously construed the same terms and we found such a construction to have violated ERISA.

To the extent that Defendants-Appellants argue that the District Court erred by instructing the plan administrator to calculate benefits by deducting the nominal value of prior distributions denominated in 1980s dollars from accrued benefits denominated in current dollars, *see Appellants' Br.* at 38-41, we reject their argument for reasons similar to those applicable to their arguments on behalf of their own preferred "new hire" remedy. The District Court had discretion to design a remedy to provide Plaintiffs-Appellees with the proper level of pension benefits in light of the ERISA violations we identified in our prior decision. [**17] As Defendants-Appellants wrote a pension plan that addresses the situation of a discharged-and-then-rehired employee with what can only be described as ambiguity, contradiction or silence, we see no problem with the District Court's selection of one reasonable approach among several reasonable alternatives. *Cf. Lifson v. INA Life Ins. Co. of N. Y., 333 F.3d 349, 353 (2d Cir. 2003)* (per curiam) (instructing that a court should [*120] construes ambiguities in plan terms against the drafter of the ERISA plan).

II. Releases of Certain Plaintiffs' ERISA Claims

The final issue raised in this appeal is Defendants-Appellants' argument that the District Court erred in ruling that the release forms signed by several Plaintiffs-Appellees did not apply to the ERISA claims asserted in this litigation.[3] The releases at issue

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[3] The District Court stated that [**18] twenty-two of the named Plaintiffs signed release

provided that the signing employee "release[s] Xerox from any and all claims . . . based on anything that has occurred prior to the date [he or she] sign[s] this Release" in exchange for up to fifty-two weeks of salary continuance. In addition, the form specifies several potential federal claims, including those based in ERISA, that the release covers.

As a threshold matter, Plaintiffs-Appellees argue, for the first time in this appeal, that Defendants-Appellants may not rely upon the release forms signed by several Plaintiffs-Appellees because *Federal Rule of Civil Procedure 17(a)* requires that an action in federal court "be prosecuted in the name of the real party in interest." Although Defendants-Appellants are the pension plan at issue in this litigation and its administrators, Plaintiffs-Appellees argue that only Xerox Corporation has a "sufficient stake in reversing the trial court's ruling that the Xerox general release [**19] form constitutes a waiver of ERISA claims by the releasee." *Appellees' Br.* at 39. As noted above, the District Court dismissed Xerox early in this litigation, and Plaintiffs-Appellees did not appeal this ruling. *See Frommert, 433 F.3d at 256 n.2.* Moreover, Plaintiffs-Appellees did not challenge the authority of Defendants-Appellants to rely upon the releases below and thus have waived this argument for purposes of this appeal. *See Rogers v. Samedan Oil Corp., 308 F.3d*

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forms, but that four of these amended their forms to carve out explicitly their claims as members of the "Frommert lawsuit" from the universe of claims to be covered by the release. *See Frommert, 472 F. Supp. 2d at 460.* On appeal, Defendants-Appellants do not challenge the District Court's conclusion that these individuals' release forms did not cover their ERISA claims in this action. As a result, we will not disturb the District Court's conclusion that the release forms do not bar the ERISA claims asserted by these four Plaintiffs-Appellees in this litigation.

477, 482-84 (5th Cir. 2002) (affirming district court's ruling that third-party defendant had waived real-party-in-interest defense by failing to assert it until the day before trial); *Richardson v. Edwards, 326 U.S. App. D.C. 429, 127 F.3d 97, 99 (D.C. Cir. 1997)* (deeming real-party-in-interest defense waived when not raised until appellate proceedings).

Even if Plaintiffs-Appellees had not waived this argument, their real-party-in-interest argument is meritless because the release form itself defines its reference to "Xerox" to include "'the Xerox employee benefit plans'" in which the employee had participated or was then participating. *See Frommert, 472 F. Supp. 2d at 460 n.2* (quoting release forms). Moreover, Defendants-Appellants are not [**20] the parties *prosecuting* this action; that role belongs to Plaintiffs-Appellees. *See* 6A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice & Procedure* § 1542 (2d ed. 1990) ("[T]he real party in interest principle . . . directs attention to whether [the] plaintiff has a significant interest in the particular action he has instituted, and *Rule 17(a)* is limited to plaintiffs."). *Cf. Stichting Ter Behartiging Van de Belangen Van Oudaandeelhouders In Het Kapitaal Van Saybolt Int'l B. V. v. Schreiber, 407 F.3d 34, 49 (2d Cir. 2005)* (holding that a *Rule 17(a)* defect may not [*121] be cured by the joinder, as nominal defendants, of the real parties in interest to the action where those parties have evinced no intention of prosecuting the action). Thus, Plaintiffs-Appellees' real-party-in-interest argument fails.

As to the merits of Defendants-Appellants' arguments regarding the releases, "an individual can waive his or her right to participate in a pension plan governed by ERISA only if his or her waiver 'is made knowingly and voluntarily.'" *Finz v. Schlesinger, 957 F.2d 78, 82 (2d Cir. 1992)* (quoting *Laniok v. Advisory Comm. of Brainerd Mfg. Co. Pension Plan, 935 F.2d 1360, 1365 (2d Cir. 1991)).* [**21] We have articulated several factors as relevant to the determination of

whether such a waiver is knowing and voluntary:

> 1) the plaintiff's education and business experience, 2) the amount of time the plaintiff had possession of or access to the agreement before signing it, 3) the role of plaintiff in deciding the terms of the agreement, 4) the clarity of the agreement, 5) whether the plaintiff was represented by or consulted with an attorney, [as well as whether an employer encouraged the employee to consult an attorney and whether the employee had a fair opportunity to do so] and 6) whether the consideration given in exchange for the waiver exceeds employee benefits to which the employee was already entitled by contract or law.
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> . . . [T]his list of factors [is] not exhaustive . . . .

Id. (internal citation omitted). A court should consider the "totality of the circumstances" in determining whether a waiver of ERISA rights is knowing and voluntary. *Id.*

Despite acknowledging the explicit and broad language in the release form, the District Court concluded that the instant ERISA claims were not covered due to perceived deficiencies related to "the clarity of the release and the consideration [**22] given by Xerox in exchange for the releases." *Frommert, 472 F. Supp. 2d at 461-62.* Specifically, the District Court focused on one paragraph in which the signing employee agrees that "the consideration set forth in this Release is in addition to anything of value to which I am entitled by law or Xerox policy." The District Court concluded that this language meant that the employee was not waiving his or her ERISA claim:

> The import of paragraph 5 is that the salary continuance given to the employee did not take the place of, but was in addition to, any benefits to which the employee was *already* entitled by law or Xerox policy. This suggests that the employee was not waiving his right to such benefits. If he were, it would make little sense to describe his salary continuance as being "in addition to" such benefits.
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> . . .
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> Furthermore, while it might be argued that there is a distinction between a right to pension benefits in general and a "claim" seeking to have those benefits calculated according to a particular formula, that is a distinction without a difference here, because the Second Circuit has now held that, at least with respect to employees rehired before 1998, Xerox's "reduction [**23] of justified expectations of benefits [by using the phantom account] took the form of a retroactive cut-back in violation of" ERISA. In other words, those employees were "entitled by law" not simply to receive some pension benefits, but to have their benefits calculated without any reduction attributable to a "phantom" account.

Id. at 462 (footnote omitted; emphasis in original).

[*122] In reaching this conclusion, the District Court appears to have conflated the existence of consideration adequate to render a release enforceable

with the scope of claims thereby released.[4] The paragraph on which the District Court focused provided only that the consideration for the release, *i.e.,* the salary continuance, did not replace any benefits, including pension benefits, to which the employee was already entitled. However, there is no allegation that Defendants-Appellants violated this term of the contract by denying these Plaintiffs-Appellees any and all pension benefits to which they would have been entitled. To the contrary, counsel for Defendants-Appellants represented to this Court at oral argument that several of these Plaintiffs-Appellees had already received pension benefits, albeit calculated [**24] under the "phantom account" offset

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[4] The District Court also appears to have concluded that the releases failed to comply with a provision of the Older Workers Benefit Protection Act ("OWBPA"), *29 U.S.C. § 626(f)*, and that such noncompliance has relevance to the determination of whether these Plaintiffs-Appellees released Xerox from ERISA-based claims. *See Frommert, 472 F. Supp. 2d at 463 n.5. Section 626(f)* specifies several facts that must exist in order to render waiver of claims asserted under the Age Discrimination in Employment Act ("ADEA"), *29 U.S.C. § 621 et seq.,* both "knowing and voluntary." We need not and do not decide whether the release forms complied with the requirements of the OWBPA because such noncompliance, even if proven, is irrelevant to the question of whether a release of non-ADEA claims was "knowing and voluntary." *See Chaplin v. NationsCredit Corp., 307 F.3d 368, 375 (5th Cir. 2002)* ("[T]he OWBPA . . . applies only to ADEA claims."); *see also Tung v. Texaco Inc., 150 F.3d 206, 208-09 (2d Cir. 1998)* (per curiam) (concluding that plaintiff's waiver of his Title VII claims was knowing and voluntary despite the employer's noncompliance with § 626(f) requirements [**25] applicable to his ADEA claims).

method.

At bottom, neither the uncertainty of such benefits at the time of release nor the fact that hindsight has revealed that such benefits are now worth more than the signing Plaintiffs-Appellees likely expected at that time can render these releases unenforceable. As the method used to calculate pension benefits for rehired employees was, and has continued to be, disputed throughout this litigation, the precise amount of benefits that an employee signing a release would have received in the absence of such a release was always indeterminate. Plaintiffs-Appellees who signed these releases did so before the District Court crafted its remedy for the ERISA violations we identified. The mere fact that the anticipated recovery associated with ongoing litigation is uncertain does not render an employee's release of claims asserted in that litigation unenforceable. *Cf. Anita Founds., Inc. v. ILGWU Nat'l Ret. Fund, 902 F.2d 185, 189 (2d Cir. 1990)* ("[A] settlement payment, made when the law was uncertain, cannot be successfully attacked on the basis of any subsequent resolution of the uncertainty.").

Applying the factors we have articulated as relevant to the issue [**26] of whether a waiver of ERISA rights was knowing and voluntary and reviewing the undisputed facts pertaining to these releases under the totality of the circumstances, *see Finz, 957 F.2d at 82*, we conclude that the District Court erred in holding that the releases at issue were unenforceable. There appears to be no dispute that those Plaintiffs-Appellees who signed these releases had ample time (45 days) to decide whether to sign the release, that Xerox encouraged such individuals to consult an attorney, and that the signatories received salary continuances in consideration of their releasing claims. Some Plaintiffs-Appellees even modified the terms of the release forms with which they had been [*123] presented before signing them. As to the language of the releases themselves, we cannot

conclude, as the District Court did, that the express terms of these releases were "at the very least ambiguous as to what the employee was giving up in exchange for salary continuance." *Frommert, 472 F. Supp. 2d at 462.* As the District Court's interpretation of the release forms is incorrect, it cannot stand. Unless the release form at issue specifically exempted this litigation as noted above, the releases [**27] signed by certain Plaintiffs-Appellees are enforceable.

CONCLUSION

For the foregoing reasons, we VACATE that portion of the order of the District Court holding that eighteen release forms are unenforceable, AFFIRM that portion of the order crafting a remedy for the identified ERISA violations, and REMAND the case for proceedings not inconsistent with this opinion.

APPENDIX B

PAUL J. FROMMERT, et al., Plaintiffs, v. SALLY L. CONKRIGHT, PATRICIA M. NAZEMETZ AND LAWRENCE M. BECKER, XEROX CORPORATION RETIREMENT INCOME GUARANTEE PLAN ADMINISTRATORS AND XEROX CORPORATION RETIREMENT INCOME GUARANTEE PLAN, Defendants.

00-CV-6311L

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK

472 F. Supp. 2d 452, 2007 U.S. Dist. LEXIS 5044, 39 Employee Benefits Cas. (BNA) 2529

January 24, 2007, Decided
January 24, 2007, Filed

SUBSEQUENT HISTORY: Stay granted by, Motion denied by *Frommert v. Conkright, 2007 U.S. Dist. LEXIS 15370 (W.D.N.Y., Mar. 6, 2007)*
Affirmed in part and vacated in part by, Remanded by *Frommert v. Conkright, 2008 U.S. App. LEXIS 15585 (2d Cir. N.Y., July 24, 2008)*

PRIOR HISTORY: *Frommert v. Conkright, 433 F.3d 254, 2006 U.S. App. LEXIS 250 (2d Cir. N.Y., 2006)*

COUNSEL: [**1] For Paul J. Frommert, Donald S. Foote, Thomas I. Barnes, Ronald J. Campbell, Frank D. Commesso, William F. Coons, James D. Gagnier, Brian L. Gaita, William J. Ladue, Gerald A. Leonardo, Jr., Frank Mawdesley, Harold S. Mitchell, Walter J.

Petroff, Richard C. Spring, Patricia M. Johnson, F. Patricia M. Tobin, Nancy A. Revella, Anatoli G. Puschkin, William R. Plummer, Michael J. McCoy, Alan H. Clair, Larry J. Gallagher, Napoleon B. Barbosa, Alexandra Spearman Harrick, Janis A. Edelman, Patricia H. Johnston, Kenneth P. Parnett, Joyce D. Cathcart, Floyd Swaim, Julie A. McMillian, Dennis E. Baines, Ruby Jean Murphy, Matthew D. Alfieri, Thomas F. McGee, Vincent G. Johnson, F. Colt Hitchcock, Ronnie Tabak, Martha Lee Taylor, Kathy Fay Thompson, Mary Beth Allen, Craig R. Spencer, Linda S. Bourque, Thomas Michael Vasta, Frank C. Darling, Clark C. Dingman, Carol E. Gannon, Joseph E. Wright, David M. Rohan, David B. Ruddock, Charles Hobbs, Charles Zabinski, Charles J. Maddalozzo, Joyce M. Pruett, William A. Craven, Maureen A. Loughlin Jones, Kenneth W. Pietrowski, Bonnie Cohen, Lawrence R. Holland, Gail A. Nasman, Steven D. Barley, Donna S. Lipari, Andrew C. Matteliano, Michael Horrocks, Candice [**2] J. White, Dennis E. Bains, Kathleen E. Hunter, John L. Crisafulli, Deborah J. Davis, Brenda H. McConnell, Kathleen A. Bowen, Robert P. Caranddo, Terence J. Kurtz, William J. Cheslock, Thomas E. Dalton, Lynn Barnsdale, Bruce D. Craig, Gary P. Hardin, Claudette M. Long, Dale Platteter, Mary Ann Sergeant, Molly White Kehoe, Irshad Quershi, David K. Young, Leslie Ann Wunsch, Richard J. Glikin, Eugene H. Updyke, Michael R. Benson, Alvin M. Adams, Ronnie Kolniak, James J. Farrell, Robert L. Brackhahn, Benjamin C. Roth, Richard C. Carter, Carmen J. Sofia, Kathleen W. Levea, Frederick Scacchitti, Paul Defina, James G. Walls, Plaintiffs: George A. Schell, Jr., LEAD ATTORNEY, Schell & Schell, Fairport, NY; Robert H. Jaffe, LEAD ATTORNEY, Jaffe & Schlesinger, P.A., Springfield, NJ.

For Gail J. Levy, John A. Williams,., Crystal Thornton, Charles R. Drannbauer, William M. Burritt, Janice Ross Heiler, Consol Plaintiffs: Robert H. Jaffe, LEAD ATTORNEY, Jaffe & Schlesinger, P.A., Springfield,

NJ.

For Sally L. Conkright, Xerox Corporation Pension Plan Administrator, Patricia M. Nazemetz, Xerox Corporation Pension Plan Administrator, Xerox Corporation, Lawrence Becker, Xerox Corporation Plan [**3] Administrators, Xerox Corporation Retirement Income Guarantee Plan, Defendants: Margaret A. Clemens, LEAD ATTORNEY, Nixon Peabody LLP, Rochester, NY.

For Xerox Corporation Retirement Income Guarantee Plan, Xerox Corporation, a New York Corporation, Consol Defendants: Margaret A. Clemens, LEAD ATTORNEY, Nixon Peabody LLP, Rochester, NY.

JUDGES: DAVID G. LARIMER, United States District Judge.

OPINION BY: DAVID G. LARIMER

OPINION

[*455] DECISION AND ORDER

INTRODUCTION

This decision constitutes the latest chapter in a long-running dispute between employees of Xerox Corporation and administrators of Xerox's retirement plan, the Xerox Corporation Retirement Income Guarantee Plan ("the Plan"), concerning calculation of retirement benefits. The dispute involves a relatively small group of employees who previously left employment at Xerox, received a lump-sum distribution upon their initial departure, and then were rehired by Xerox years later. Those employees are now contemplating retirement, or have retired, and the issue in dispute is how their present retirement benefits should be calculated.

With respect to this group of rehired employees, the

Plan is designed so that an employee's total [**4] years of employment at Xerox, regardless of whether there was a break in service, are counted in calculating the employee's retirement benefits. Generally, the relevant pension calculations are based on the employee's total years of employment times a percentage of the employee's five highest-paying calendar years with Xerox. Both sides in this litigation agree that to avoid duplication of benefits, some sort of offset against current benefits is necessary to reflect the employee's receipt of monies at the time of the prior separation from employment. Just how that offset against current benefits should be calculated, though, has been a matter of much dispute and has engendered a great deal of litigation.

Familiarity with this Court's several prior decisions involving these parties, *see 328 F.Supp.2d 420 (W.D.N.Y. 2004)*; *206 F.Supp.2d 435 (W.D.N.Y. 2002)*, and also the Second Circuit's decision of January 6, 2006, *433 F.3d 254* ("Second Circuit decision") is presumed. These decisions set out in great detail the relevant facts and disputed issues between the parties. There is, therefore, no need to restate those matters here.

The Second Circuit [**5] decision, which was on an appeal from two of this Court's prior decisions dismissing some of plaintiff's claims and granting summary judgment in favor of defendants on the remaining claims, resolved many of the issues raised between the parties. The Second Circuit affirmed in part, reversed in part, and remanded the case to this Court for further proceedings.

[*456] The Second Circuit held that the Plan's use of a so-called phantom account in determining present benefits violated the Employee Retirement Income Security Act ("ERISA"), *29 U.S.C. § 1101 et seq.*, in several respects. First, the Plan's formula constituted a "retroactive cut-back" of benefits, *433 F.3d at 268*, contrary to § 204(g) of ERISA. In addition, the court

found that employees were not given proper notice in the Summary Plan Description ("SPD") of the nature and scope of the phantom account, at least prior to 1998, when the SPD was amended to include the phantom account and describe the offset procedure. *Id. at 263, 269.*

The Second Circuit determined that employees rehired after 1998 had sufficient notice as to the manner by which Xerox intended to treat their [**6] previous distribution. For those rehired prior 1998, though, the Second Circuit remanded to this Court and directed me to "utilize an appropriate pre-amendment [1998] calculation," *id. at 268*, without using the "phantom account," to determine current benefits.

Specifically, the Second Circuit directed as follows:

> On remand, the remedy crafted by the district court for those employees rehired prior to 1998 should utilize an appropriate pre-amendment calculation to determine their benefits. We recognize the difficulty that this task poses because of the ambiguous manner in which the pre-amendment terms of the Plan described how prior distributions were to be treated. As guidance for the Court, we suggest that it may wish to employ equitable principles when determining the appropriate calculation in fashioning the appropriate remedy.

Id.

Subsequent to the Second Circuit's decision, the Court met with counsel to determine how best to proceed. The parties agreed to work together to see if they could resolve the issues remaining on remand. Although the parties appear to have spent some time attempting to reach a settlement, it is now apparent

that [**7] they are unable, or unwilling, to settle.

The Court conducted a two-day hearing on the remedial issues raised by the Second Circuit and has received both pre-hearing and post-hearing memoranda from both sides. The parties have also discussed several cases from other jurisdictions dealing with similar issues. Having considered both sides' submissions and arguments, the Court now issues this Decision and Order concerning the issues before it on remand.

DISCUSSION

I. The Appropriate Calculation of Plaintiffs' Benefits

This Court's task on remand is made easier in many respects by the breadth of the Second Circuit decision. The Circuit resolved many issues and has clearly established the law of the case in many respects. For example, it can no longer be disputed that employees were not give proper notice in either the Plan or the relevant SPD as to the nature of the phantom account and its operation. Utilization of this phantom account or anything similar to it has been soundly rejected by the Court of Appeals in this case as well as a previous case involving the same Plan, *Layaou v. Xerox Corporation, 238 F.3d 205 (2d Cir. 2001)*. Other courts have [**8] reached the same conclusion. *Miller v. Xerox Corp. Ret. Income Guarantee Plan, 464 F.3d 871 (9th Cir. 2006)*; *Berger v. Xerox Corp. Ret. Income Guarantee Plan, 338 F.3d 755 (7th Cir. 2003)*. It is clear, then, that Xerox may not lawfully use the phantom account mechanism, as to either [*457] the named plaintiffs in this lawsuit, or anyone else who was rehired by Xerox prior to 1998, after having previously received a distribution of pension benefits. The Second Circuit has addressed this issue more than once, and Xerox may not continue to utilize this rejected formula.

The Second Circuit also rejected Xerox's contention

that a procedure utilizing a phantom account has always been a part of the Plan, even prior to 1998. *433 F.3d at 256.* The Circuit determined that Xerox's use of the phantom account constituted a retroactive diminution of benefits, contrary to the law. *Id. at 268.* Furthermore, the Court of Appeals rejected Xerox's contention that it had properly amended the Plan and notified the Plan's participants concerning utilization of the phantom account, prior to 1998. *Id. at 263.*

Although the Circuit clearly [**9] precluded use of the phantom account in determining how to treat prior distributions, it did little to elucidate what formula *should* be adopted, except to suggest using an "appropriate pre-amendment calculation" guided by equitable principles in determining the appropriate remedy for affected employees. *Id. at 268.*

The problem is that if one removes the phantom account mechanism, there is little else remaining. The Circuit expressly recognized this by noting the "difficulty" confronting the district court "because of the ambiguous manner in which the pre-amendment terms of the Plan described how prior distributions were to be treated." *Id. at 268.*

Describing the procedures to be utilized prior to the 1998 amendments as "ambiguous" is generous. In fact, virtually nothing is set forth in either the Plan or the SPD as to the precise mechanism for taking into account a prior distribution in calculating an employee's present benefits after a rehire.

Some testimony at the hearing before me focused on the appropriate economic, financial and actuarial methods for treating prior distributions. But this Court is not charged with writing a sound retirement [**10] plan. Rather, I must interpret the Plan as written and consider what a reasonable employee would have understood to be the case concerning the effect of prior distributions. If the employee had no notice of the "phantom account," he also had no notice of some of the other mechanisms suggested by witnesses at the

remand hearing before me. What is "best" from a financial or actuarial point of view is not what the Court has been charged with determining. The Court's task, as directed by the Court of Appeals, is simply to determine, based on the language of the Plan and the SPD, what benefits are now due this group of rehired employees.

To the extent that there is some ambiguity as to the precise manner by which prior distributions are to be offset from present benefits, it is Xerox, not the employees, who should suffer. *See Burke v. Kodak Ret. Income Plan, 336 F.3d 103, 113 (2d Cir. 2003)* ("The consequences of an inaccurate SPD must be placed on the employer"). It was defendants' obligation to provide a clear description, in the SPD and in the Plan itself, as to how those prior distributions would be treated. To the extent that the Plan was constituted, at Xerox's doing, [**11] to consider all prior years of service, defendants had the burden of elucidating precisely how that would be accomplished.

As noted by the Court of Appeals in this case, *433 F.3d at 258*, the Plan does have a provision, § 9.6, dealing with "nonduplication of benefits." That section provides as follows:

> *Nonduplication of Benefits.* In the event any part of or all of a Member's [*458] accrued benefit is distributed to him prior to his Normal Retirement Date, if Section 8.8 [dealing with incompetent beneficiaries] does not apply to such distribution and such Member at any time thereafter recommences active participation in the Plan, the accrued benefit of such Member based on all Years of Participation shall be offset by the accrued benefit attributable to such distribution.

"Accrued benefit," as used in § 9.6, is defined at § 1.1

as follows:

> The normal retirement benefit which a Member has earned up to any date, and which is payable at Normal Retirement Date in an amount computed in accordance with Section ... 4.3 [which sets forth the general method for calculating the normal retirement benefit], based, however, only upon Average Monthly Compensation [**12] received and Years of Participation rendered by a Member up to the date as of which the Accrued Benefit is computed ... .

As the Court of Appeals noted, there was no description whatsoever as to the mechanics of this so-called phantom account. *433 F.3d at 258.* For that reason, the Second Circuit and other courts rejected the administrator's utilization of such a mechanism in calculating benefits.

The SPD provides even less guidance than the Plan in this regard. As the Court of Appeals noted, the only notice in the SPD concerning non-duplication of benefits was the proviso that "the amount you receive may also be reduced if you had previously left the company and received a distribution at that time." *Id. at 265* (citing *Layaou, 238 F.3d at 210*). The Court of Appeals in both *Frommert* and *Layaou* determined that this bare-bones notice failed to adequately apprise employees as to the phantom account mechanism.

In addition, as those and other cases make clear, where the Plan and the SPD conflict, the SPD controls. *See Burke, 336 F.3d at 110; Frommert, 433 F.3d at 265. Accord Tocker v. Philip Morris Companies, Inc., 470 F.3d 481, 487-88 (2d Cir. 2006);* [**13] *Demirovic v. Building Service 32 B-J Pension Fund, 467 F.3d 208, 210 n. 1 (2d Cir. 2006); Bouboulis v. Transport Workers Union of America, 442 F.3d 55, 61 (2d Cir. 2006).*

The question, then, is what, in light of these vague provisions in the Plan and SPD, this Court should to do to remedy the violation of ERISA. I believe that the best course is to do what I did previously in *Layaou* involving a similar remand from the Court of Appeals. *Layaou v. Xerox Corporation, 330 F.Supp.2d 297 (W.D.N.Y. 2004).* In *Layaou,* I directed the administrator "to recalculate plaintiff's retirement benefit, ... and to pay plaintiff a lump sum in the amount of the difference between the amount of benefits that plaintiff has received, and the amount of the recalculated benefit, without any consideration of a 'phantom account.'" *Id. at 305* (footnote omitted). I added that "[i]t would not be unreasonable ... for the administrator to subtract out the amount of the prior distribution," in order to avoid giving the plaintiff a windfall, but left it to the Plan administrator to perform the actual calculation of the plaintiff's benefits [**14] in the first instance, stating that "[i]f plaintiff believes that the administrator's calculation is erroneous, and the matter cannot be resolved between the parties, he can seek further relief in this Court." *Id. at 304.*

The same process should apply here. This process is straightforward; it adequately prevents employees from receiving a windfall, and I believe it most clearly reflects what a reasonable employee would have anticipated based on the not-very-clear language in the Plan and SPD. [*459] Again, if there is some doubt or ambiguity as to this formula, it must be resolved in favor of the employee. *See Lifson v. INA Life Ins. Co. of New York, 333 F.3d 349, 353 (2d Cir. 2003)* (in reading an ERISA plan, "[w]e construe ambiguities against the drafter and in favor of the beneficiary"); *Perreca v. Gluck, 295 F.3d 215, 223 (2d Cir. 2002)* ("absent evidence indicating the intention of the parties, any ambiguity in the language used in an ERISA plan should be construed against the interests of the party that drafted the language").

In so ruling, I also reject defendants' suggestion that the phantom account offset can properly be applied [**15] to *all* employees' accrued benefits earned *after* 1998, regardless of when the employees were rehired. As defendants themselves note, the Second Circuit's statement that "the phantom account may not be applied to employees rehired prior to the issuance of the 1998 SPD," *433 F.3d at 263*, "does not expressly contain this limitation," Defendant's Pre-Hearing Brief Addressed to Remedies, Dkt. # 121-1 at 23, and I decline defendants' invitation to infer such a limitation from that apparently categorical statement. The Court of Appeals gave this Court specific directives on remand, and determining whether the phantom account offset should apply to post-1998 earned benefits of employees rehired prior to that date was not among those directives.

II. Which of the Plaintiffs Were Rehired by Xerox after the Plan Was Amended in 1998

The Court of Appeals also directed the district court "to determine which of the plaintiffs were rehired by Xerox after the Plan was amended to include the phantom account and thus can be bound by its terms." *433 F.3d at 269*. This directive relates to the Second Circuit's holding that "for employees rehired subsequent to [**16] the amendment of the Plan through the 1998 SPD, the phantom account is a component of the Plan that they joined and thus may permissibly be applied to them." *Id. at 263*. As the court explained,

> [e]mployees hired after this amendment to the Plan occurred, unlike those rehired before then, became Plan participants under the terms of the amended Plan. As such, the phantom account may permissibly be applied to them. With full notice of the phantom account's existence, these rehired employees, unlike their predecessors who

> lacked such information, had the opportunity to make an informed decision about taking or leaving the terms of the deal offered to them under the Plan.

Id. at 269. That matter does not appear to be in dispute, however, and I presume that the parties will be able to agree on whether each employee was rehired prior to or after the 1998 amendment date. If the parties are unable to agree about whether a particular employee was rehired prior to that, they may seek a determination of that question from the Court.

III. Effect of the Releases Signed by Twenty-Two Plaintiffs

On January 5, 2001, plaintiffs' counsel [**17] filed a motion for "emergent injunctive relief," seeking relief in connection with Xerox's offer to plaintiffs to accept the termination of their employment as part of a reduction in force ("RIF"), and to sign a general release waiving any existing or potential claims they might have had against Xerox--including ERISA claims--in exchange for salary continuance, a form of severance benefit in which the employee would continue to receive his full, regular salary for a specified period even after he stopped working at Xerox.

In his affidavit in support of that motion, plaintiffs' attorney, Robert H. Jaffe, Esq., [*460] characterized Xerox's offer as a form of discrimination against his clients based on their exercise of their rights under ERISA by filing or joining this lawsuit challenging defendants' use of the phantom account offset. Dkt. # 47 P 2.

In his affidavit, Jaffe noted that the proposed release "includes a waiver or withdrawal of any claims that were made or could have been made by [plaintiffs] for recalculation of retirement benefits under ERISA." *Id.* P 5. He added that "[t]he form of general release

which Xerox has asked at least five clients [**18] of my law office to execute explicitly includes a release of all claims under ERISA." *Id.* P 8.

Jaffe stated that as of the date of the affidavit, five of his clients, three of whom were then named plaintiffs in this action, had asked him to review the proposed release "and suggest an alternative which would avoid a waiver of their rights under ERISA," at least until the Second Circuit issued a decision in *Layaou,* which was then pending before the Court of Appeals.[1] *Id.* P 9. Jaffe stated that he had drafted a revised release containing language "which carves out from its scope the waiver of pending ERISA claims for recalculation of retirement benefits." *Id.* P 10. Jaffe said that his clients had presented the revised release to Xerox, but were told by Xerox that "it was unacceptable." *Id.*

After hearing oral argument, [**19] this Court denied plaintiffs' motion in open court on January 11, stating in effect that I saw no ERISA violation in an employer's conditioning an offer of severance benefits on a release of ERISA claims. *See* Dkt. # 53 at 38-42.

Twenty-two of the 104 named plaintiffs did subsequently sign the releases and were terminated in a RIF in exchange for salary continuance. Dkt. # 133-7. Although the exact language used varies somewhat among the releases, in general they state that the employee "release[s] Xerox from any and all claims, even if [the employee] d[oes]n't know about the claim at this time, based on anything that has occurred prior to the date [the employee] sign[s] this Release." [2] The

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[1] The Second Circuit's decision remanding *Layaou* was issued about two weeks after plaintiffs filed their motion, on January 18, 2001.

[2] "Xerox" is defined by the releases to include, *inter alia,* "the Xerox employee benefit plans" in

releases expressly referenced a number of types of claims covered by the release, including ERISA claims. With certain exceptions not relevant here, the releases also provided that the employee agreed not to "file or pursue any charge or claim with any governmental agency or any court against Xerox based on anything that occurred before [the employee] signed this Release." *Id.*

[**20] Each release also states that the employee "acknowledge[s] and agree[s] that the consideration set forth in this Release is in addition to anything of value to which [the employee] is entitled by law and/or Xerox policy." *Id.* Four of the releases, however, contain additional language carving out an exception for plaintiffs' claims in this action: "I acknowledge and agree that the consideration set forth in this Release is in addition to anything of value to which I am entitled by law or Xerox policy, including my right to a pension under the Xerox Retirement Income Guarantee Plan to which I do not release my claim as a member of the Frommert lawsuit." *Id.* at 49, 57, 69, 88.

Plaintiffs now contend that the execution of these releases, even the ones without a [*461] specific exclusion for the claims in this lawsuit, does not bar any of them from pursuing their ERISA claims in this action. Plaintiffs contend that the releases are ambiguous in certain respects, and therefore unenforceable.

As a preliminary matter, I note that plan participants can waive ERISA claims, and that such waivers will be enforced as long as they are knowing and voluntary. *See, e.g., Laniok v. Advisory Committee of Brainerd Mfg. Co. Pension Plan, 935 F.2d 1360,*

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which the employee was a participant, as well as the trustees and administrators of those plans. Dkt. # 133-7.

1367 (2d Cir. 1991) [**21] ("the age discrimination provision of ERISA does not prohibit an individual waiver of pension plan participation by an older employee, ... so long as the waiver is knowing and voluntary"); *Mange v. Petrolite Corp., 960 F.Supp. 206, 209 (E.D.Mo. 1997)* ("Under ERISA, a release of claims by plan participants is valid so long as it is knowing and voluntary"). There is also authority that "[a] settlement agreement that releases legal claims in exchange for severance benefits may be enforced under ERISA." *Seman v. FMC Corp. Ret. Plan, 334 F.3d 728, 731-32 (8th Cir. 2003); see also Smart v. Gillette Co. Long-Term Disability Plan, 887 F.Supp. 383, 386 (D.Mass. 1995)* (employee knowingly, intentionally, and voluntarily agreed to a severance plan that included a general release which precluded her ERISA claim), *aff'd, 70 F.3d 173, (1st Cir. 1995).*

The Second Circuit has cautioned, however, that "[t]he validity of an individual's waiver of pension benefits is subject to closer scrutiny than his or her waiver of general contract claims." *Finz v. Schlesinger, 957 F.2d 78, 81 (2d Cir. 1992), cert. denied, 506 U.S. 822, 113 S. Ct. 72, 121 L. Ed. 2d 38 (1992);* [**22] *accord Sharkey v. Ultramar Energy Ltd., 70 F.3d 226, 231 (2d Cir. 1995).* Courts should look to the "totality of circumstances" to determine whether a release is knowing and voluntary. *Sharkey v. Ultramar Energy Ltd., Lasmo plc, Lasmo (AUL Ltd.), 70 F.3d 226, 231 (2d Cir. 1995).*

The relevant factors to consider in this analysis include: (1) the plaintiff's education and business experience; (2) the amount of time the plaintiff had possession of or access to the release before signing it; (3) the plaintiff's role in deciding the terms of the release; (4) the clarity of the release; (5) whether the plaintiff was represented by or consulted an attorney; (6) whether the consideration given in exchange for the employee's waiver exceeds benefits to which the employee was already entitled by contract or law; (7) whether the employer encouraged the employee to

consult an attorney; and (8) whether the employee had a fair opportunity to do so. *Bormann v. AT & T Communications, Inc., 875 F.2d 399, 402-03 (2d Cir.), cert. denied, 493 U.S. 924, 110 S. Ct. 292, 107 L. Ed. 2d 272 (1989).* These factors are not exhaustive, and all [**23] need not be satisfied before a release is deemed enforceable. *Id.*

Here, some of these factors, such as the time (45 days) that plaintiffs had to consider whether to sign the release, and Xerox's encouragement to them to consult an attorney before signing, weigh in favor of enforcement of the releases. Other factors, however, are more troubling, particularly the clarity of the release and the consideration given by Xerox in exchange for the releases.

Paragraphs 3 and 4 of the releases generally provide that the employee releases Xerox from any and all employment-related claims. [3] Paragraph 3 states that the [*462] employee "release[s] Xerox from "any and all claims ... based on anything that has occurred prior to the date" on which the employee signed the release, and paragraph 4 states that the employee "also release[s] Xerox from claims based on [any federal, state or local law] concerning employment ... ." Paragraph 3 lists ERISA claims as one of the types of claims waived by the employee. Read literally, this could be construed to mean that the employee was waiving *any* claim under ERISA, based on anything that occurred prior to the date on which he signed the release. [**24]

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[3] These numbers refer to Xerox's standard release form for participation in a voluntary RIF. *See, e.g.,* Dkt. # 133-7 at 47. The numbering varies somewhat among the releases signed by plaintiffs (some of whom were terminated in involuntary RIFs), though the provisions are essentially the same.

As stated, paragraph 5 states that the consideration set forth in the release, *i.e.,* Xerox's agreement to provide the employee with salary continuance, is "in addition to anything of value to which [the employee] is entitled by law and/or Xerox policy." This provision was presumably included in the release in order to conform to the requirements of the Older Workers Benefit Protection Act ("OWBPA"), which was enacted by Congress to modify the Age Discrimination in Employment Act ("ADEA") in certain respects, *see Meacham v. Knolls Atomic Power Laboratory, 461 F.3d 134, 150 (2d Cir. 2006).*

The OWBPA provides in part that "[a]n individual may not waive any right or claim under [the ADEA] unless [**25] the waiver is knowing and voluntary," and that in general "a waiver may not be considered knowing and voluntary unless at a minimum" certain conditions are met, one of which is that "the individual waives rights or claims only in exchange for consideration in addition to anything of value to which the individual already is entitled ... ." *29 U.S.C. § 626(f).*

The import of paragraph 5 is that the salary continuance given to the employee did not take the place of, but was in addition to, any benefits to which the employee was *already* entitled by law or Xerox policy. This suggests that the employee was *not* waiving his right to such benefits. If he were, it would make little sense to describe his salary continuance as being "in addition to" such benefits.

Read that way, the releases would not bar plaintiffs' claims here. If plaintiffs were entitled to pension benefits under the law, *i.e.,* ERISA, or under Xerox's own policies, they did not waive their rights to such benefits. Furthermore, while it might be argued that there is a distinction between a right to pension benefits in general and a "claim" seeking to have those benefits calculated according [**26] to a particular formula, that is a distinction without a difference here,

because the Second Circuit has now held that, at least with respect to employees rehired before 1998, Xerox's "reduction of justified expectations of benefits [by using the phantom account] took the form of a retroactive cut-back in violation of" ERISA. [4] *433 F.3d at 268.* In other words, those employees were "entitled by law" not simply to receive *some* pension benefits, but to have their benefits calculated without any reduction attributable to a "phantom" account.

Even if some other interpretations of the releases might be plausible, the releases are at the very least ambiguous as to what the employee was giving up in exchange for salary continuance. Section 5 may have been added primarily to comply with the OWBPA, but it cannot [**27] be ignored, and when read in conjunction with paragraphs 3 and 4, it appears to create some [*463] doubt about whether the release truly covered all ERISA claims, especially the proper calculation of benefits to which the employee was entitled. [5]

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[4] ERISA's anti-cutback rule provides that "[t]he accrued benefit of a participant under a plan may not be decreased by an amendment of the plan." *29 U.S.C. § 1054(g)(1).*

[5] I recognize that there is authority that noncompliance with the OWBPA does not automatically invalidate a release as to non-ADEA claims. *See Chaplin v. Nationscredit Corp., 307 F.3d 368, 375 (5th Cir. 2002); Kaminski v. CoreStates Fin. Corp., No. CIV. A. 98-CV-1623, 1998 U.S. Dist. LEXIS 18579, 1998 WL 800536, at *3 (E.D.Pa. Nov. 18, 1998).* That does not make such noncompliance irrelevant, however. The requirements of the OWBPA were intended by Congress to ensure that an employee's waiver of his rights be "knowing and voluntary." *29 U.S.C. § 626(f)(1).* Thus, an employer's tendering of consideration that does not

[**28] I recognize that these releases were signed during this litigation, and that in plaintiffs' January 5, 2001 motion for injunctive relief, plaintiffs' own counsel expressed his concern that the releases would constitute "a waiver or withdrawal of any claims that were made or could have been made by [plaintiffs] for recalculation of retirement benefits under ERISA." Certainly these facts could suggest that at least some of the parties understood the releases to cover their claims in this lawsuit. That does not alter the fact, though, that by its terms, the release appears to except from the scope of the waiver any benefits to which the employee is legally entitled. Under Xerox's interpretation, the Plan administrator could refuse to pay an employee *any* pension and, by dint of the release, the employee could do nothing about it. Again, any ambiguity on that score should be resolved against Xerox, which drafted the releases. *Lifson, 333 F.3d at 353; see also Albany Savings Bank, FSB v. Halpin, 117 F.3d 669, 674 (2d Cir. 1997)* ("ambiguities in contracts should be construed against the drafter").

Furthermore, if it had been the parties' mutual understanding [**29] that the releases covered all of plaintiffs' claims in this litigation, it would have been a simple enough matter for Xerox to have included language to that effect in the releases. *See, e.g., Morais v. Central Bev. Corp. Union Employees' Supplemental Ret. Plan, 167 F.3d 709, 711 (1st Cir. 1999)* (enforcing settlement agreement and release that expressly stated that plaintiff had directed his union to withdraw his grievance and demand for arbitration over disputed benefits). A single sentence would have clarified the matter. That some of the *plaintiffs* added language to their releases making clear that the

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exceed the value of anything to which the employee was already entitled is some evidence that the employee's waiver executed in exchange for that consideration was not knowing and voluntary.

releases did not cover their claims in this action demonstrates how easy it would have been for Xerox to insert language in the other releases to include the employees' claims in this particular case, which was already in litigation. [6]

[**30] The omission of any mention of this lawsuit is, in one sense, not surprising, though it is still worth noting. On their face, these releases (other than the ones to which some plaintiffs inserted language expressly excepting their claims in this case from the scope of the release) do not appear to have anything to do with this litigation. Rather, they appear to be standard release forms given to all employees who choose to participate in a RIF, and are aimed at foreclosing the possibility of [*464] the employee's later assertion of claims relating to his termination in the RIF. In an effort to make them comprehensive, the release form lists an array of statutes, including ERISA, that it is intended to cover, but otherwise there is no suggestion that plaintiffs' claims in this case, or any other particular claims, were being waived. On the contrary, the reference to the stated consideration being "in addition to anything of value to which [the employee is] entitled by law or Xerox policy" suggests that the employee did *not* waive any then-pending claims alleging an entitlement to some particular benefits.

Another factor that the Second Circuit has directed

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[6] One could argue, of course, that the language added by several plaintiffs excluding their claims in *Frommert* suggests that the other releases *did* cover those claims. That some plaintiffs chose to insert language clarifying what they understood to be the scope of the release, however, sheds little light on the meaning of the other plaintiffs' releases, which remain, at best, ambiguous on that score.

courts to consider in deciding [**31] whether a waiver is enforceable is whether the consideration given in exchange for the employee's waiver exceeds benefits to which the employee was already entitled by contract or law. *Bormann, 875 F.2d at 403.* In the case at bar, it appears that, at least with respect to some of the plaintiffs, the consideration received by the plaintiffs, *i.e.,* salary continuance, amounted to far less than they would have received under the Plan without the phantom account offset. In the case of plaintiff Pietrowski, for example, it appears that his prior lump-sum payment at the time of his first separation, plus his severance pay at the time of his second separation, totaled about $ 210,000, but that he would have received over $ 832,000 as a lump-sum payment of his standard Plan annuity. *See* Dkt. # 130-2 Ex. D.

Defendants do not appear to dispute that the plaintiffs in question received less than they would have without the phantom account offset; they simply contend that the consideration received was substantial, and that in any event, the disparity is not as great as plaintiffs contend because defendants' proposed remedial approach would still result in a lesser benefit [**32] than what plaintiffs seek. Of course, I have rejected that remedial approach.

The consideration received by plaintiffs here--in some cases up to a year's salary--was not insignificant. In light of the Second Circuit decision, however, it cannot be said that these benefits exceeded what plaintiffs were entitled to by law, *i.e.,* pension benefits calculated without a phantom account offset. While it is true that plaintiffs did not know, at the time that they signed the releases, what the ultimate result of this litigation would be, both they and Xerox knew that plaintiffs were pursuing ERISA claims for amounts far greater than what Xerox was offering

them in exchange for signing the releases. [7] This at least casts some additional doubt on whether the releases were entered into knowingly and voluntarily with respect to plaintiffs' ERISA claims. *See Unum Life Ins. Co. of America v. Cappello, 278 F.Supp.2d 228, 236 (D.R.I. 2003)* (value of consideration that plan participant received, though "not an insubstantial sum," did not match what issuer of plan contended she waived by entering into severance agreement, since it was likely that amount of benefits to which she [**33] would have been entitled would have been substantial).

I also note that paragraph 3 only releases Xerox from claims "based on anything that ha[d] occurred prior to the date" on which the release was signed. Arguably, that language did not cover plaintiffs' later [*465] receipt of benefits, in amounts less than that to which they claim they are entitled, due to the use of the phantom account offset. At the time the releases were signed, plaintiffs had not yet left Xerox's employ, and had only received projections of [**34] what their benefits would be. Again, that is not the only reasonably interpretation; one could also argue that in light of the existence of this lawsuit challenging that very offset, everyone involved understood the releases to cover any claims concerning the offset. But this nonetheless adds to the ambiguity of the scope of the release, which should not be resolved against

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[7] It appears that one plaintiff, Matthew Alfieri, signed his release on October 27, 2006, after the Second Circuit decision was issued. Dkt. # 133-7 at 46. I see no reason for this Court to rule any differently as to Alfieri, however. If anything, the Second Circuit decision had by that point made it even clearer that Alfieri, like the other plaintiffs, was entitled to calculation of his pension benefit without the phantom account offset, and therefore that he was not waiving his claim in that regard.

plaintiffs.

IV. Breach of Fiduciary Duty

In its decision in this case, the Court of Appeals concluded that there was a triable issue of fact as to "whether the defendants had fiduciary obligations under ERISA and if so whether they breached them ... ." *433 F.3d at 271.* The court stated that

> [o]n remand, the district court should permit a trier of fact to assess (1) whether the defendants acted in a fiduciary capacity when they communicated with the Plan's beneficiaries about the implementation of the phantom account, and (2) whether those communications contained affirmative misrepresentations of fact concerning the Plan or breached the defendants' duty to deal fairly with the Plan's beneficiaries.

Id. at 271-72. The court also "direct[ed] the district [**35] court that if the plaintiffs prevail on this claim, it must determine what 'appropriate equitable relief' is necessary." *Id. at 272.*

Although it might appear difficult to reconcile this directive with the Court of Appeals' holding that "[b]ecause adequate relief is available under [§ 502(a)(1)(B), which allows a plan participant 'to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan'], there is no need on the facts of this case to also allow equitable relief under § 502(a)(3)," *433 F.3d at 270,* I find it unnecessary to resolve any apparent contradiction in that regard, since plaintiffs do not appear to seek any equitable relief on remand, other than relief which either this Court has effectively granted, or which the Second Circuit has already found

to be unwarranted.

Plaintiffs do contend that the Court should rule that the Second Circuit's decision in this case is "class-based," and that it "encompasses all rehired Xerox employee rehired prior to the publication of the September 1998 SPD," Dkt. # 129-1, but to the extent [**36] that plaintiffs seek some sort of declaratory or injunctive relief in that regard, the Second Circuit has held that this is not a proper case for such relief. As stated, the Court of Appeals held that "the necessary remedies can be fully provided under § 502(a)(1)(B)," *433 F.3d at 269*, and concluded that "sweeping relief" in the form of a judgment declaring that the phantom account is prohibited by ERISA and enjoining its application in calculating the benefits of any Plan participants was "not warranted," *id.* [8]

Having said that, the rulings contained both in the Second Circuit decision and in this Decision and Order *do* seem applicable to all Xerox employees who are similarly situated to the named plaintiffs. Leaving aside any particularized [**37] defenses [*466] that the Plan might have against individual employees, I do not see how defendants could continue to utilize the phantom account as to such employees without running afoul of the Second Circuit's holding that "the phantom account may not be applied to employees rehired prior to the issuance of the 1998 SPD." *433 F.3d at 263*. The clear import of the Second Circuit's decision is that utilization of the phantom account with respect to employees rehired before the 1998 Plan amendment violates ERISA. But neither this Court, nor apparently the Second Circuit, sees any basis for granting equitable relief in that regard at this time.

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[8] If plaintiffs' use of the term "class-based" is meant to imply that the Court should grant some "class"-wide relief, that request is also denied. This is not a class action, nor have plaintiffs ever presented it as, or sought to make it a class action.

I also note that the purported basis for plaintiffs' claim for breach of fiduciary duty appears to have shifted somewhat over the course of this litigation. Originally, plaintiffs alleged that "defendants breached their fiduciary duty to Plan participants by publishing and supplying misleading information in SPDs, annual Personal Benefits Statements and in response to the plaintiffs' requests for clarification of their rights under the Plan." *433 F.3d at 270.* On remand, however, this claim seems to focus largely if not entirely [**38] on the releases signed by some of the plaintiffs. Specifically, plaintiffs now contend that defendants breached their fiduciary obligation to disclose to those Plan participants who signed the release "that implementation of the phantom account offset violates *ERISA § 204(g)* and *ERISA § 204(h)* and further that the consideration paid for executing the release was substantially less than the retirement benefits to which they may be entitled to receive [sic] if the phantom account offset was not applied." Dkt. # 129-1 at 15.

In any event, the relief that plaintiffs now seek is simply a ruling by this Court that the releases are unenforceable against plaintiffs insofar as it purports to waive claims for "enhanced" retirement benefits, *i.e.,* benefits calculated without using the phantom account offset. *See id.* at 19. That is essentially what the Court has done. Plaintiffs are getting all of the relief, equitable or otherwise, to which they are entitled. There is no need, therefore, to rule on plaintiffs' claim for breach of fidudiary duty.

V. Plaintiff Holland

Plaintiff Lawrence R. Holland has at all relevant times been an hourly (*i.e.,* non-salaried) Xerox employee [**39] who is covered by the terms of a collective bargaining agreement. Defendants contend that as such, Holland has never been a participant in the Plan, which by its terms excludes from its coverage

"[a]ny person covered by a collective bargaining agreement, the terms of which do not require coverage under this Plan ... ." Dkt. # 121-5 at 6. Therefore, defendants contend, Holland lacks standing to sue for benefits under the Plan.

In response, plaintiffs do not appear to deny that Holland is a participant in a different pension plan from the one at issue in this case, but contend that the plan in which he is a participant utilizes the same phantom account offset as the Plan covering the other plaintiffs. The essence of plaintiffs' argument seems to be that the Court should simply allow Holland's claims to go forward in this case so that hourly Xerox workers will be able to benefit from the Second Circuit's rulings in this case and the relief ordered by this Court with respect to the other named plaintiffs.

Holland's request must be denied. It is axiomatic that only plan participants and beneficiaries may sue for benefits under § 1132(a)(1)(B). *See Nechis v. Oxford Health Plans, Inc., 421 F.3d 96, 100-01 (2d Cir. 2005)* [**40] (citing *Franchise Tax Board v.* [*467] *Construction Laborers Vacation Trust for S. Cal., 463 U.S. 1, 27, 103 S. Ct. 2841, 77 L. Ed. 2d 420 (1983)).* Holland's suggestion that the Court allow the administrators of his plan to be joined as defendants in this action is denied, as plaintiff has shown no basis for adding additional defendants in this case at this late date. Plaintiffs' contention that defendants have only recently raised the argument that Holland is not entitled to any benefits under the Plan is contradicted by this Court's July 30, 2004 Decision and Order, in which I expressly referenced (but found it unnecessary to decide) defendants' arguments to that effect, *328 F.Supp.2d at 439 n. 14.* Furthermore, plaintiffs have made no motion to amend the complaint to add additional defendants, and plaintiffs' memoranda and other papers on remand are not a proper vehicle for

making such a request. [9]

[**41] **VI. Plaintiffs' Motion to Amend the Complaint**

On November 6, 2006, plaintiffs filed a motion for leave to file a second amended and consolidated complaint, adding a number of additional plaintiffs in this case. The gist of the motion was that following the remand from the Second Circuit, additional Xerox employees who had been separated from and then rehired by Xerox prior to 1998 contacted plaintiffs' counsel, seeking to join in or obtain the benefits of this lawsuit. Plaintiffs' counsel wrote to the Plan administrator, essentially asking him to waive these individuals' exhaustion requirements under ERISA and apply the rulings of this Court and the Court of Appeals in this case and in *Layaou* to these additional Plan participants. Dkt. # 132-3 at 1-4. The administrator's response was, essentially, that until a "final resolution" of this action, the phantom account offset would continue to be applied to all Plan participants, with "no exception or deviation." *Id.* at 5.

To the extent that any of the proposed new plaintiffs have not yet retired from Xerox, I see no basis for adding them to this lawsuit. As stated earlier, the Second Circuit's holding that "the phantom [**42] account may not be applied to employees rehired prior to the issuance of the 1998 SPD," *433 F.3d at 263*, would certainly seem to foreclose defendants from utilizing the phantom account in calculating "new" retirees' pension benefits.

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[9] It would seem to be beyond dispute, though, that use of a "phantom account" in the manner found unlawful by the Second Circuit decision violates ERISA and cannot be used by *any* plan. It is presumed that no plan administrator would knowingly violate ERISA.

At this point, however, this motion has not been briefed by defendants, and since there may be issues involving individualized defenses or other matters bearing upon the motion to amend, I will not decide the motion at this time, but will instead reserve decision after the matter has been fully briefed, as set forth in the Conclusion of this Decision and Order.

CONCLUSION

Plaintiffs' motion for a determination of the decision of the Second Circuit Court of Appeals and for other further relief (Dkt. # 129) is granted in part and denied in part, and defendants' cross-motion for partial summary judgment (Dkt. # 133) is granted in part and denied in part. Defendants are hereby directed to recalculate plaintiffs' retirement benefits, consistent with the terms of this Decision and Order and the January 6, 2006 decision of the Court of Appeals for the Second Circuit, and to pay each plaintiff a lump sum in the amount of the difference between [**43] the amount of benefits that each plaintiff has [*468] received, and the amount of the recalculated benefit, without any consideration of a "phantom account." Plaintiffs' claim for breach of fiduciary duty is denied as moot. Plaintiff Lawrence Holland's claims are dismissed in their entirety.

Defendants are directed to respond to plaintiffs' motion for an extension of time to file a second consolidated and amended complaint (Dkt. # 132) within thirty (30) days after the date of issuance of this Decision and Order. Plaintiffs shall file reply papers no later than fifteen (15) days after the date that defendants' response is filed.

IT IS SO ORDERED.

DAVID G. LARIMER

United States District Judge

Dated: Rochester, New York

January 24, 2007.

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT
THURGOOD MARSHALL U.S. COURT HOUSE
40 FOLEY SQUARE, NEW YORK, N.Y. 10007

Catherine O'Hagan Wolfe
CLERK OF COURT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the ____ day of September two thousand and eight,

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Paul J. Frommert, Alan H. Clair, Donald S. Foote, Thomas I. Barnes, Ronald J. Campbell, Frank D. Commesso, William F. Coons, James D. Gagnier, Brian L. Gaita, William J. Ladue, Gerald A. Leonardo Jr., Frank Mawdesley, Harold S. Mitchell, Walter J. Petroff, Richard C. Spring, Patricia M. Johnson, F. Patricia M. Tobin, Nancy A. Revella, Anatoli G. Puschkin, William R. Plummer, Michael J. McCoy, Larry J. Gallagher, Napoleon B. Barbosa, Alexandra Spearman Harrick,
Janis A. Edelman,
Patricia H. Johnston,
Kenneth P. Parnett,
Joyce D. Cathcart, Floyd Swaim, Julie A. McMillan, Dennis E. Baines, Ruby Jean Murphy, Matthew D. Alfieri, Kathy Fay Thompson, Mary Beth Allen, Craig R. Spencer, Linda S. Bourque, Thomas Michael Vasta, Frank C. Darling, Clark C. Dingman, Carol E. Gannon, Joseph E. Wright, David M. Rohan, David B. Ruddock, Charles Hobbs, Charles Zabinski, Charles J. Maddalozzo, Joyce M. Pruett, William A. Craven,

UNITED STATES COURT OF APPEALS
FILED
SEP 25, 2008
Catherine O'Hagan Wolfe, Clerk
SECOND CIRCUIT

Maureen A. Loughlin Jones, Kenneth W. Pietrowski, Bonnie Cohen, Lawrence R. Holland, Gail A. Nasman, Steven D. Barley, Donna S. Lipari, Andrew C. Matteliano, Michael Horrocks, Candice J. White, Dennis E. Bains, Kathleen E. Hunter, John L. Crisafulli, Deborah J. Davis, Brenda H. McConnell, Kathleen A. Bowen, Robert P. Caranddo, Terence J. Kurtz, William J. Cheslock, Thomas E. Dalton, Lynn Barnsdale, Bruce D. Craig, Gary P. Hardin, Claudette M. Long, Dale Platteter, Mary Ann Sergeant, Molly White Kehoe, Irshad Quershi, David K. Young, Leslie Ann Wunsch, Eugene H. Updyke, Michael R. Benson, Alvin M. Adams, Ronnie Kolniak, James J. Farrell, Robert L. Brackhahn, Benjamin C. Roth, Richard C. Carter, Carmen J. Sofia, Kathleen W. Levea, Frederick Scacchitti, Paul Defina, James G. Walls, Gail J. Levy, John A. Williams, Crystal Thornton, Charles R. Drannbauer, William M. Burritt, and Janice Ross Heiler,

Plaintiffs-Appellees,

ORDER
No. 07-0418-cv

v.

Sally L. Conkright, Xerox Corporation Pension Plan Administrator, Patricia M. Nazemetz, Xerox Corporation Pension Plan Administrator, Lawrence M. Becker, Xerox Corporation Plan Administrator, Xerox Corporation Retirement Income Guarantee Plan, and Xerox Corporation, a New York Corporation,

Defendants-Appellants,

XEROX CORPORATION,

Defendant.

Appellees, Paul J. Frommert, Alan H. Clair, Donald S. Foote, et al., having filed a petition for panel

rehearing, or, in the alternative, for rehearing en banc, and the panel that determined the appeal having considered the request for panel rehearing, and the active members of the Court having considered the request for rehearing en banc,

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

By: s/
Richard Alcantara, Deputy Clerk

APPENDIX D

MANDATE

WDNY/RONY
00-CV-6311
FELDMAN
LARIMER

United States Court of Appeals
FOR THE
SECOND CIRCUIT

JUDGMENT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 24th day of July, two thousand eight,

Before: Hon. Chester J. Straub,
Hon. Reena Raggi,
Circuit Judges,
Hon. William K. Sessions, III,
District Judge.*

UNITED STATES COURT OF APPEALS
FILED
JUN 24, 2008
Catherine O'Hagan Wolfe, Clerk
SECOND CIRCUIT

Docket No. 07-0418-cv

Paul J. Frommert, Alan H. Clair, Donald S. Foote, Thomas I. Barnes, Ronald J. Campbell, Frank D. Commesso, William F. Coons, James D. Gagnier, Brian L. Gaita, William J. Ladue, Gerald A. Leonardo Jr., Frank Mawdesley, Harold S. Mitchell, Walter J.

Petroff, Richard C. Spring, Patricia M. Johnson, F. Patricia M. Tobin, Nancy A. Revella, Anatoli G. Puschkin, William R. Plummer, Michael J. McCoy, Larry J. Gallagher, Napoleon B. Barbosa, Alexandra Spearman Harrick, Janis A. Edelman, Patricia H. Johnston, Kenneth P. Parnett, Joyce D. Cathcart, Floyd Swaim, Julie A. McMillan, Dennis E. Baines, Ruby Jean Murphy, Matthew D. Alfieri, Kathy Fay Thompson, Mary Beth Allen, Craig R. Spencer, Linda S. Bourque, Thomas Michael Vasta, Frank C. Darling, Clark C. Dingman, Carol E. Gannon, Joseph E. Wright, David M. Rohan, David B. Ruddock, Charles Hobbs, Charles Zabinski, Charles J. Maddalozzo, Joyce M. Pruett, William A. Craven, Maureen A. Loughlin Jones, Kenneth W. Pietrowski, Bonnie Cohen, Lawrence R. Holland, Gail A. Nasman, Steven D. Barley, Donna S. Lipari, Andrew C. Matteliano, Michael Horrocks, Candice J. White, Dennis E. Bains, Kathleen E. Hunter, John L. Crisafulli, Deborah J. Davis, Brenda H. McConnell, Kathleen A. Bowen, Robert P. Caranddo, Terence J. Kurtz, William J. Cheslock, Thomas E. Dalton, Lynn Barnsdale, Bruce D. Craig, Gary P. Hardin, Claudette M. Long, Dale Platteter, Mary Ann Sergeant, Molly White Kehoe, Irshad Quershi, David K. Young, Leslie Ann Wunsch, Eugene H. Updyke, Michael R. Benson, Alvin M. Adams, Ronnie Kolniak, James J. Farrell, Robert L. Brackhahn, Benjamin C. Roth, Richard C. Carter, Carmen J. Sofia, Kathleen W. Levea, Frederick Scacchitti, Paul Defina, James G. Walls, Gail J. Levy, John A. Williams, Crystal Thornton, Charles R. Drannbauer, William M. Burritt, and Janice Ross Heiler,

Plaintiffs-Appellees,

v.

Sally L. Conkright, Xerox Corporation Pension Plan Administrator, Patricia M. Nazemetz, Xerox

Corporation Pension Plan Administrator, Lawrence M. Becker, Xerox Corporation Plan Administrator, Xerox Corporation Retirement Income Guarantee Plan, and Xerox Corporation, a New York Corporation,

Defendants-Appellants,

XEROX CORPORATION,

Defendant.

Issued as Mandate:

OCT 22, 2008

Appeal from the United States District Court for the Western District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Western District of New York and was argued by counsel.

ON CONSIDERATION THEREOF, it is hereby ORDERED, ADJUDGED and DECREED that the judgment of said district court be and hereby is AFFIRMED IN PART, VACATED IN PART, and REMANDED for further proceedings in accordance with the opinion of this Court.

FOR THE COURT:
CATHERINE O'HAGAN WOLFE, Clerk
by

s/
Joy Pallek
Administrative Attorney

*The Honorable William K. Sessions, III, Chief Judge of the United States District Court for the District of Vermont, sitting by designation.

A TRUE COPY
Catherine O'Hagan Wolfe, Clerk

by s/
DEPUTY CLERK (Seal)

APPENDIX E

29 USC Sec. 626

§ 626. Recordkeeping, investigation, and enforcement

(a) Attendance of witnesses; investigations, inspections, records, and homework regulations. The Secretary [Commission] shall have the power to make investigations and require the keeping of records necessary or appropriate for the administration of this Act in accordance with the powers and procedures provided in sections 9 and 11 of the Fair Labor Standards Act of 1938, as amended (*29 U.S.C. 209* and *211*).

(b) Enforcement; prohibition of age discrimination under fair labor standards; unpaid minimum wages and unpaid overtime compensation; liquidated damages; judicial relief; conciliation, conference, and persuasion. The provisions of this Act shall be enforced in accordance with the powers, remedies, and procedures provided in sections 11(b), 16 (except for subsection (a) thereof), and 17 of the Fair Labor Standards Act of 1938, as amended (*29 U.S.C. 211(b), 216, 217*), and subsection (c) of this section. Any act prohibited under section 4 of this Act [*29 USCS § 623*] shall be deemed to be a prohibited act under section 15 of the Fair Labor Standards Act of 1938, as amended (*29 U.S.C. 215*). Amounts owing to a person as a result of a violation of this Act shall be deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of sections 16 and 17 of the Fair Labor Standards Act of 1938, as amended (*29 U.S.C. 216, 217*): *Provided,* That liquidated damages shall be payable only in cases of willful violations of this Act In any action brought to enforce this Act the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this Act, including without limitation judgments compelling employment, reinstatement or

promotion, or enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation under this section. Before instituting any action under this section, the Secretary [Commission] shall attempt to eliminate the discriminatory practice or practices alleged, and to effect voluntary compliance with the requirements of this Act through informal methods of conciliation, conference, and persuasion.

(c) Civil actions; persons aggrieved; jurisdiction; judicial relief; termination of individual action upon commencement of action by Secretary [Commission]; jury trial.

(1) Any person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this Act: *Provided,* That the right of any person to bring such action shall terminate upon the commencement of an action by the Secretary [Commission] to enforce the right of such employee under this Act.

(2) In an action brought under paragraph (1), a person shall be entitled to a trial by jury of any issue of fact in any such action for recovery of amounts owing as a result of a violation of this Act, regardless of whether equitable relief is sought by any party in such action.

(d) Filing of charge with Secretary [Commission]; timeliness; conciliation, conference, and persuasion. No civil action may be commenced by an individual under this section until 60 days after a charge alleging unlawful discrimination has been filed with the Secretary [Commission]. Such a charge shall be filed--

(1) within 180 days after the alleged unlawful practice occurred; or

(2) in a case to which section 14(b) [*29 USCS § 633(b)*] applies, within 300 days after the alleged unlawful practice occurred, or within 30 days after receipt by the individual of notice of termination of proceedings under State law, whichever is earlier.

Upon receiving such a charge, the Secretary [Commission] shall promptly notify all persons named in such charge as prospective defendants in the action and shall promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion.

(e) Reliance on administrative rulings; notice of dismissal or termination; civil action after receipt of notice. Section 10 of the Portal-to-Portal Act of 1947 [*29 USCS § 259*] shall apply to actions under this Act. If a charge filed with the Commission under this Act is dismissed or the proceedings of the Commission are otherwise terminated by the Commission, the Commission shall notify the person aggrieved. A civil action may be brought under this section by a person defined in section 11(a) [*29 USCS § 630(a)*] against the respondent named in the charge within 90 days after the date of the receipt of such notice.

(f) Waiver.

(1) An individual may not waive any right or claim under this Act unless the waiver is knowing and voluntary. Except as provided in paragraph (2), a waiver may not be considered knowing and voluntary unless at a minimum--

(A) the waiver is part of an agreement between the individual and the employer that is written in a manner calculated to be understood by such individual, or by the average individual eligible to participate;

(B) the waiver specifically refers to rights or claims arising under this Act;

(C) the individual does not waive rights or claims that may arise after the date the waiver is executed;

(D) the individual waives rights or claims only in exchange for consideration in addition to anything of value to which the individual already is entitled;

(E) the individual is advised in writing to consult with an attorney prior to executing the agreement;

(F) (i) the individual is given a period of at least 21 days within which to consider the agreement; or

(ii) if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the individual is given a period of at least 45 days within which to consider the agreement;

(G) the agreement provides that for a period of at least 7 days following the execution of such agreement, the individual may revoke the agreement, and the agreement shall not become effective or enforceable until the revocation period has expired;

(H) if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the employer (at the commencement of the period specified in subparagraph (F)) informs the individual in writing in a manner calculated to be understood by the average individual eligible to participate, as to--

(i) any class, unit, or group of individuals covered by such program, any eligibility factors for such program, and any time limits applicable to such program; and

(ii) the job titles and ages of all individuals eligible or selected for the program, and the ages of all individuals in the same job classification or organizational unit who are not eligible or selected for the program.

(2) A waiver in settlement of a charge filed with the Equal Employment Opportunity Commission, or an action filed in court by the individual or the individual's representative, alleging age discrimination of a kind prohibited under section 4 or 15 [*29 USCS § 623* or *633a*] may not be considered knowing and voluntary unless at a minimum--

(A) subparagraphs (A) through (E) of paragraph (1) have been met; and

(B) the individual is given a reasonable period of time within which to consider the settlement agreement.

(3) In any dispute that may arise over whether any

of the requirements, conditions, and circumstances set forth in subparagraph (A), (B), (C), (D), (E), (F), (G), or (H) of paragraph (1), or subparagraph (A) or (B) of paragraph (2), have been met, the party asserting the validity of a waiver shall have the burden of proving in a court of competent jurisdiction that a waiver was knowing and voluntary pursuant to paragraph (1) or (2).

(4) No waiver agreement may affect the Commission's rights and responsibilities to enforce this Act. No waiver may be used to justify interfering with the protected right of an employee to file a charge or participate in an investigation or proceeding conducted by the Commission.

29 C.F.R. 1625.22
Waivers of rights and claims under the ADEA.

(a) Introduction. (1) Congress amended the ADEA in 1990 to clarify the prohibitions against discrimination on the basis of age. In Title II of OWBPA, Congress addressed waivers of rights and claims under the ADEA, amending section 7 of the ADEA by adding a new subsection (f).

(2) Section 7(f)(1) of the ADEA expressly provides that waivers may be valid and enforceable under the ADEA only if the waiver is "knowing and voluntary". Sections 7(f)(1) and 7(f)(2) of the ADEA set out the minimum requirements for determining whether a waiver is knowing and voluntary.

(3) Other facts and circumstances may bear on the question of whether the waiver is knowing and voluntary, as, for example, if there is a material mistake, omission, or misstatement in the information furnished by the employer to an employee in connection with the waiver.

(4) The rules in this section apply to all waivers of ADEA rights and claims, regardless of whether the

employee is employed in the private or public sector, including employment by the United States Government.

(b) Wording of Waiver Agreements. (1) Section 7(f)(1)(A) of the ADEA provides, as part of the minimum requirements for a knowing and voluntary waiver, that:

The waiver is part of an agreement between the individual and the employer that is written in a manner calculated to be understood by such individual, or by the average individual eligible to participate.

(2) The entire waiver agreement must be in writing.

(3) Waiver agreements must be drafted in plain language geared to the level of understanding of the individual party to the agreement or individuals eligible to participate. Employers should take into account such factors as the level of comprehension and education of typical participants. Consideration of these factors usually will require the limitation or elimination of technical jargon and of long, complex sentences.

(4) The waiver agreement must not have the effect of misleading, misinforming, or failing to inform participants and affected individuals. Any advantages or disadvantages described shall be presented without either exaggerating the benefits or minimizing the limitations.

(5) Section 7(f)(1)(H) of the ADEA, relating to exit incentive or other employment termination programs offered to a group or class of employees, also contains a requirement that information be conveyed "in writing in a manner calculated to be understood by the average participant." The same standards applicable to the similar language in section 7(f)(1)(A) of the

ADEA apply here as well.

(6) Section 7(f)(1)(B) of the ADEA provides, as part of the minimum requirements for a knowing and voluntary waiver, that "the waiver specifically refers to rights or claims under this Act." Pursuant to this subsection, the waiver agreement must refer to the Age Discrimination in Employment Act (ADEA) by name in connection with the waiver.

(7) Section 7(f)(1)(E) of the ADEA requires that an individual must be "advised in writing to consult with an attorney prior to executing the agreement."

(c) Waiver of future rights. (1) Section 7(f)(1)(C) of the ADEA provides that:

A waiver may not be considered knowing and voluntary unless at a minimum . . . the individual does not waive rights or claims that may arise after the date the waiver is executed.

(2) The waiver of rights or claims that arise following the execution of a waiver is prohibited. However, section 7(f)(1)(C) of the ADEA does not bar, in a waiver that otherwise is consistent with statutory requirements, the enforcement of agreements to perform future employment-related actions such as the employee's agreement to retire or otherwise terminate employment at a future date.

(d) Consideration. (1) Section 7(f)(1)(D) of the ADEA states that:

A waiver may not be considered knowing and voluntary unless at a minimum * * * the individual waives rights or claims only in exchange for consideration in addition to anything of value to which the individual already is entitled.

(2) "Consideration in addition" means anything of

value in addition to that to which the individual is already entitled in the absence of a waiver.

(3) If a benefit or other thing of value was eliminated in contravention of law or contract, express or implied, the subsequent offer of such benefit or thing of value in connection with a waiver will not constitute "consideration" for purposes of section 7(f)(1) of the ADEA. Whether such elimination as to one employee or group of employees is in contravention of law or contract as to other employees, or to that individual employee at some later time, may vary depending on the facts and circumstances of each case.

(4) An employer is not required to give a person age 40 or older a greater amount of consideration than is given to a person under the age of 40, solely because of that person's membership in the protected class under the ADEA.

(e) Time periods. (1) Section 7(f)(1)(F) of the ADEA states that:

A waiver may not be considered knowing and voluntary unless at a minimum * * *

(i) The individual is given a period of at least 21 days within which to consider the agreement; or

(ii) If a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the individual is given a period of at least 45 days within which to consider the agreement.

(2) Section 7(f)(1)(G) of the ADEA states:

A waiver may not be considered knowing and voluntary unless at a minimum . . . the agreement provides that for a period of at least 7 days following the execution of such agreement, the individual may

revoke the agreement, and the agreement shall not become effective or enforceable until the revocation period has expired.

(3) The term "exit incentive or other employment termination program" includes both voluntary and involuntary programs.

(4) The 21 or 45 day period runs from the date of the employer's final offer. Material changes to the final offer restart the running of the 21 or 45 day period; changes made to the final offer that are not material do not restart the running of the 21 or 45 day period. The parties may agree that changes, whether material or immaterial, do not restart the running of the 21 or 45 day period.

(5) The 7 day revocation period cannot be shortened by the parties, by agreement or otherwise.

(6) An employee may sign a release prior to the end of the 21 or 45 day time period, thereby commencing the mandatory 7 day revocation period. This is permissible as long as the employee's decision to accept such shortening of time is knowing and voluntary and is not induced by the employer through fraud, misrepresentation, a threat to withdraw or alter the offer prior to the expiration of the 21 or 45 day time period, or by providing different terms to employees who sign the release prior to the expiration of such time period. However, if an employee signs a release before the expiration of the 21 or 45 day time period, the employer may expedite the processing of the consideration provided in exchange for the waiver.

(f) Informational requirements. (1) Introduction. (i) Section 7(f)(1)(H) of the ADEA provides that:

A waiver may not be considered knowing and voluntary unless at a minimum . . . if a waiver is requested in connection with an exit incentive or other

employment termination program offered to a group or class of employees, the employer (at the commencement of the period specified in subparagraph (F)) [which provides time periods for employees to consider the waiver] informs the individual in writing in a manner calculated to be understood by the average individual eligible to participate, as to—

(i) Any class, unit, or group of individuals covered by such program, any eligibility factors for such program, and any time limits applicable to such program; and

(ii) The job titles and ages of all individuals eligible or selected for the program, and the ages of all individuals in the same job classification or organizational unit who are not eligible or selected for the program.

(ii) Section 7(f)(1)(H) of the ADEA addresses two principal issues: to whom information must be provided, and what information must be disclosed to such individuals.

(iii)(A) Section 7(f)(1)(H) of the ADEA references two types of "programs" under which employers seeking waivers must make written disclosures: "exit incentive programs" and "other employment termination programs." Usually an "exit incentive program" is a voluntary program offered to a group or class of employees where such employees are offered consideration in addition to anything of value to which the individuals are already entitled (hereinafter in this section, "additional consideration") in exchange for their decision to resign voluntarily and sign a waiver. Usually "other employment termination program" refers to a group or class of employees who were involuntarily terminated and who are offered additional consideration in return for their decision to sign a waiver.

(B) The question of the existence of a "program" will be

decided based upon the facts and circumstances of each case. A "program" exists when an employer offers additional consideration for the signing of a waiver pursuant to an exit incentive or other employment termination (e.g., a reduction in force) to two or more employees. Typically, an involuntary termination program is a standardized formula or package of benefits that is available to two or more employees, while an exit incentive program typically is a standardized formula or package of benefits designed to induce employees to sever their employment voluntarily. In both cases, the terms of the programs generally are not subject to negotiation between the parties.

(C) Regardless of the type of program, the scope of the terms "class," "unit," "group," "job classification," and "organizational unit" is determined by examining the "decisional unit" at issue. (See paragraph (f)(3) of this section, "The Decisional Unit.")

(D) A "program" for purposes of the ADEA need not constitute an "employee benefit plan" for purposes of the Employee Retirement Income Security Act of 1974 (ERISA). An employer may or may not have an ERISA severance plan in connection with its OWBPA program.

(iv) The purpose of the informational requirements is to provide an employee with enough information regarding the program to allow the employee to make an informed choice whether or not to sign a waiver agreement.

(2) To whom must the information be given. The required information must be given to each person in the decisional unit who is asked to sign a waiver agreement.

(3) The decisional unit. (i)(A) The terms "class," "unit," or "group" in section 7(f)(1)(H)(i) of the ADEA and "job

classification or organizational unit" in section 7(f)(1)(H)(ii) of the ADEA refer to examples of categories or groupings of employees affected by a program within an employer's particular organizational structure. The terms are not meant to be an exclusive list of characterizations of an employer's organization.

(B) When identifying the scope of the "class, unit, or group," and "job classification or organizational unit," an employer should consider its organizational structure and decision-making process. A "decisional unit" is that portion of the employer's organizational structure from which the employer chose the persons who would be offered consideration for the signing of a waiver and those who would not be offered consideration for the signing of a waiver. The term "decisional unit" has been developed to reflect the process by which an employer chose certain employees for a program and ruled out others from that program.

(ii)(A) The variety of terms used in section 7(f)(1)(H) of the ADEA demonstrates that employers often use differing terminology to describe their organizational structures. When identifying the population of the decisional unit, the employer acts on a case-by-case basis, and thus the determination of the appropriate class, unit, or group, and job classification or organizational unit for purposes of section 7(f)(1)(H) of the ADEA also must be made on a case-by-case basis.

(B) The examples in paragraph (f)(3)(iii), of this section demonstrate that in appropriate cases some subgroup of a facility's work force may be the decisional unit. In other situations, it may be appropriate for the decisional unit to comprise several facilities. However, as the decisional unit is typically no broader than the facility, in general the disclosure need be no broader than the facility. "Facility" as it is used throughout this section generally refers to place or location. However, in some circumstances terms such as

"school," "plant," or "complex" may be more appropriate.

(C) Often, when utilizing a program an employer is attempting to reduce its workforce at a particular facility in an effort to eliminate what it deems to be excessive overhead, expenses, or costs from its organization at that facility. If the employer's goal is the reduction of its workforce at a particular facility and that employer undertakes a decision-making process by which certain employees of the facility are selected for a program, and others are not selected for a program, then that facility generally will be the decisional unit for purposes of section 7(f)(1)(H) of the ADEA.

(D) However, if an employer seeks to terminate employees by exclusively considering a particular portion or subgroup of its operations at a specific facility, then that subgroup or portion of the workforce at that facility will be considered the decisional unit.

(E) Likewise, if the employer analyzes its operations at several facilities, specifically considers and compares ages, seniority rosters, or similar factors at differing facilities, and determines to focus its workforce reduction at a particular facility, then by the nature of that employer's decision-making process the decisional unit would include all considered facilities and not just the facility selected for the reductions.

(iii) The following examples are not all-inclusive and are meant only to assist employers and employees in determining the appropriate decisional unit. Involuntary reductions in force typically are structured along one or more of the following lines:

(A) Facility-wide: Ten percent of the employees in the Springfield facility will be terminated within the next ten days;

(B) Division-wide: Fifteen of the employees in the Computer Division will be terminated in December;

(C) Department-wide: One-half of the workers in the Keyboard Department of the Computer Division will be terminated in December;

(D) Reporting: Ten percent of the employees who report to the Vice President for Sales, wherever the employees are located, will be terminated immediately;

(E) Job Category: Ten percent of all accountants, wherever the employees are located, will be terminated next week.

(iv) In the examples in paragraph (f)(3)(iii) of this section, the decisional units are, respectively:

(A) The Springfield facility;

(B) The Computer Division;

(C) The Keyboard Department;

(D) All employees reporting to the Vice President for Sales; and

(E) All accountants.

(v) While the particular circumstances of each termination program will determine the decisional unit, the following examples also may assist in determining when the decisional unit is other than the entire facility:

(A) A number of small facilities with interrelated functions and employees in a specific geographic area may comprise a single decisional unit;

(B) If a company utilizes personnel for a common

function at more than one facility, the decisional unit for that function (i.e., accounting) may be broader than the one facility;

(C) A large facility with several distinct functions may comprise a number of decisional units; for example, if a single facility has distinct internal functions with no employee overlap (i.e., manufacturing, accounting, human resources), and the program is confined to a distinct function, a smaller decisional unit may be appropriate.

(vi)(A) For purposes of this section, higher level review of termination decisions generally will not change the size of the decisional unit unless the reviewing process alters its scope. For example, review by the Human Resources Department to monitor compliance with discrimination laws does not affect the decisional unit. Similarly, when a regional manager in charge of more than one facility reviews the termination decisions regarding one of those facilities, the review does not alter the decisional unit, which remains the one facility under consideration.

(B) However, if the regional manager in the course of review determines that persons in other facilities should also be considered for termination, the decisional unit becomes the population of all facilities considered. Further, if, for example, the regional manager and his three immediate subordinates jointly review the termination decisions, taking into account more than one facility, the decisional unit becomes the populations of all facilities considered.

(vii) This regulatory section is limited to the requirements of section 7(f)(1)(H) and is not intended to affect the scope of discovery or of substantive proceedings in the processing of charges of violation of the ADEA or in litigation involving such charges.

(4) Presentation of information. (i) The information

provided must be in writing and must be written in a manner calculated to be understood by the average individual eligible to participate.

(ii) Information regarding ages should be broken down according to the age of each person eligible or selected for the program and each person not eligible or selected for the program. The use of age bands broader than one year (such as "age 20–30") does not satisfy this requirement.

(iii) In a termination of persons in several established grade levels and/or other established subcategories within a job category or job title, the information shall be broken down by grade level or other subcategory.

(iv) If an employer in its disclosure combines information concerning both voluntary and involuntary terminations, the employer shall present the information in a manner that distinguishes between voluntary and involuntary terminations.

(v) If the terminees are selected from a subset of a decisional unit, the employer must still disclose information for the entire population of the decisional unit. For example, if the employer decides that a 10% RIF in the Accounting Department will come from the accountants whose performance is in the bottom one-third of the Division, the employer still must disclose information for all employees in the Accounting Department, even those who are the highest rated.

(vi) An involuntary termination program in a decisional unit may take place in successive increments over a period of time. Special rules apply to this situation. Specifically, information supplied with regard to the involuntary termination program should be cumulative, so that later terminees are provided ages and job titles or job categories, as appropriate, for all persons in the decisional unit at the beginning of

the program and all persons terminated to date. There is no duty to supplement the information given to earlier terminees so long as the disclosure, at the time it is given, conforms to the requirements of this section.

(vii) The following example demonstrates one way in which the required information could be presented to the employees. (This example is not presented as a prototype notification agreement that automatically will comply with the ADEA. Each information disclosure must be structured based upon the individual case, taking into account the corporate structure, the population of the decisional unit, and the requirements of section 7(f)(1)(H) of the ADEA): Example: Y Corporation lost a major construction contract and determined that it must terminate 10% of the employees in the Construction Division. Y decided to offer all terminees $20,000 in severance pay in exchange for a waiver of all rights. The waiver provides the section 7(f)(1)(H) of the ADEA information as follows:

(A) The decisional unit is the Construction Division.

(B) All persons in the Construction Division are eligible for the program. All persons who are being terminated in our November RIF are selected for the program.

(C) All persons who are being offered consideration under a waiver agreement must sign the agreement and return it to the Personnel Office within 45 days after receiving the waiver. Once the signed waiver is returned to the Personnel Office, the employee has 7 days to revoke the waiver agreement.

(D) The following is a listing of the ages and job titles of persons in the Construction Division who were and were not selected for termination and the offer of consideration for signing a waiver:

Job Title	Age	No. Selected	No. not selected
(1) Mechanical Engineers, I	25	21	48
	26	11	73
	63	4	18
	64	3	11
(2) Mechanical Engineers, II	28	3	10
	29	11	17
	Etc., for all ages		
(3) Structural Engineers, I	21	5	8
	Etc., for all ages		
(4) Structural Engineers, II	23	2	4
	Etc., for all ages		
(5) Purchasing Agents	26	10	11
	Etc., for all ages		

(g) Waivers settling charges and lawsuits. (1) Section

7(f)(2) of the ADEA provides that:

A waiver in settlement of a charge filed with the Equal Employment Opportunity Commission, or an action filed in court by the individual or the individual's representative, alleging age discrimination of a kind prohibited under section 4 or 15 may not be considered knowing and voluntary unless at a minimum—

(A) Subparagraphs (A) through (E) of paragraph (1) have been met; and

(B) The individual is given a reasonable period of time within which to consider the settlement agreement.

(2) The language in section 7(f)(2) of the ADEA, "discrimination of a kind prohibited under section 4 or 15" refers to allegations of age discrimination of the type prohibited by the ADEA.

(3) The standards set out in paragraph (f) of this section for complying with the provisions of section 7(f)(1) (A)–(E) of the ADEA also will apply for purposes of complying with the provisions of section 7(f)(2)(A) of the ADEA.

(4) The term "reasonable time within which to consider the settlement agreement" means reasonable under all the circumstances, including whether the individual is represented by counsel or has the assistance of counsel.

(5) However, while the time periods under section 7(f)(1) of the ADEA do not apply to subsection 7(f)(2) of the ADEA, a waiver agreement under this subsection that provides an employee the time periods specified in section 7(f)(1) of the ADEA will be considered "reasonable" for purposes of section 7(f)(2)(B) of the ADEA.

(6) A waiver agreement in compliance with this section

that is in settlement of an EEOC charge does not require the participation or supervision of EEOC.

(h) Burden of proof. In any dispute that may arise over whether any of the requirements, conditions, and circumstances set forth in section 7(f) of the ADEA, subparagraph (A), (B), (C), (D), (E), (F), (G), or (H) of paragraph (1), or subparagraph (A) or (B) of paragraph (2), have been met, the party asserting the validity of a waiver shall have the burden of proving in a court of competent jurisdiction that a waiver was knowing and voluntary pursuant to paragraph (1) or (2) of section 7(f) of the ADEA.

(i) EEOC's enforcement powers. (1) Section 7(f)(4) of the ADEA states:

No waiver agreement may affect the Commission's rights and responsibilities to enforce [the ADEA]. No waiver may be used to justify interfering with the protected right of an employee to file a charge or participate in an investigation or proceeding conducted by the Commission.

(2) No waiver agreement may include any provision prohibiting any individual from:

(i) Filing a charge or complaint, including a challenge to the validity of the waiver agreement, with EEOC, or

(ii) Participating in any investigation or proceeding conducted by EEOC.

(3) No waiver agreement may include any provision imposing any condition precedent, any penalty, or any other limitation adversely affecting any individual's right to:

(i) File a charge or complaint, including a challenge to the validity of the waiver agreement, with EEOC, or

(ii) Participate in any investigation or proceeding conducted by EEOC.

(j) Effective date of this section. (1) This section is effective July 6, 1998.

(2) This section applies to waivers offered by employers on or after the effective date specified in paragraph (j)(1) of this section.

(3) No inference is to be drawn from this section regarding the validity of waivers offered prior to the effective date.

(k) Statutory authority. The regulations in this section are legislative regulations issued pursuant to section 9 of the ADEA and Title II of OWBPA.

[63 FR 30628, June 5, 1998]

APPENDIX F

XEROX

Name: Ken Pietrowski
Employee # 007103
SSN: _____

Xerox Innovation Group
VOLUNTARY REDUCTION IN FORCE

REQUEST TO PARTICIPATE & GENERAL RELEASE

Request to Participate

1. I hereby request to participate in the Voluntary Reduction in Force Program ("VRIF") as described in the 2005 Xerox Innovation Group Voluntary Reduction in Force Employee Fact Sheet, dated October 24, 2005 (the "Fact Sheet"). My decision to apply is voluntary and I have not been pressured into it. I have carefully reviewed and understand the Fact Sheet, and agree to all its terms and conditions. .I have not relied on any oral representation, promises or agreements of any kind in connection with my decision to apply to participate in the VRIF.

General Release

2. In consideration of Xerox Corporation's ("Xerox") agreement to provide me with salary continuance (per the terms of the VRIF Employee Fact Sheet provided to me) and other valuable consideration, I release Xerox from all the claims described in this Release. For purposes of this Release, "Xerox" includes it employees, directors, officers, agents, stockholders, subsidiaries, affiliates, successors, assigns, and the Xerox employee benefit plans in which I either an now or have been a participant, and the trustees, administrators, successors, agents and assigns of those plans.

3. I release Xerox from any and all claims, even if I don't know about the claim at this time, based on anything that has occurred prior to the date I sign this Release. For example, I release Xerox from any claims based on all laws, such as the following (all laws as currently amended):

Age Discrimination and Employment Act of 1967 (ADEA)	Equal Pay Act of 1963
Older Workers' Benefits Protection Act of 1999 (OWBPA)	Fair Labor Standards Act of 1938
title VII of the Civil Rights Act of 1964	Employee Retirement income Security Act of 1974
Civil Rights Acts of 1866, 1870, 1871 and 1991	Worker Adjustment and Retraining Notification Act of 1989
Americans with Disabilities Act of 1990	Uniformed Services Reemployment Rights Act of 1994
Rehabilitation Act of 1973	Vietnam Era Veteran's Readjustment Assistance Act of 1974
Family and Medical Leave Act of 1993	

4. I also release Xerox from claims based on the laws of the state(s) where I am employed and reside, such as state fair employment practice laws or any other law, whether federal, state or local, concerning employment. I release Xerox from claims based on discrimination in employment such as claims arising out of the offer of employment to me by Xerox, the hiring

of me by Xerox, any employment contract between Xerox and me, any promises made by Xerox regarding future employment, or based on the termination of my employment. Finally, I also release Xerox from claims under state contract or tort law, and from all claims for punitive or compensatory damages, costs or attorney's fees.

5. I acknowledge and agree that the consideration set forth in this Release is in addition to anything of value to which I am entitled by law or Xerox policy.

6. I understand and agree that this Release and Xerox's agreement to provide consideration to me should not be construed, in any way, as an admission by Xerox of any wrongdoing or liability to me.

KP

Please initial page 1 here

7. I understand that nothing set forth in this Release limits my right to file, or prevents me from filing, a charge or complaint with the EEOC or any comparable state agency, nor does anything in this Release limit my right to participate in an investigation or proceeding conducted by the EEOC or any comparable state agency.

8. I understand that nothing in this Release limits my right to challenge this Release as not being knowing and voluntary under the ADEA or the OWBPA if I feel this Release does not comply with the requirements of those statutes.

9. Except as provided in paragraphs 7 and 8 above, however, I agree that I will not file or pursue any charge or claim with any governmental agency or any court against Xerox based on anything that occurred before I signed this Release. If I do not comply with my obligations under this paragraph, I shall repay to Xerox upon demand all of the monies paid to me by Xerox as salary continuance in consideration for this Release, and I agree to pay all of Xerox's costs and expenses in defending the claim or action, including Xerox's reasonable attorney's fees.

10. I understand and acknowledge that Xerox policy provides that for a period of one year after the termination of my employment with Xerox, I am not eligible for rehire as an employee, or for retention as a contract worker or consultant.

11. Xerox advises me:

- **TO CONSULT WITH AN ATTORNEY OF MY CHOOSING TO COUNSEL ME AS TO MY RIGHTS BEFORE i SIGN THIS RELEASE;**

- TO TAKE SUFFICIENT TIME TO DECIDE WHETHER TO SIGN THIS RELEASE. I HAVE 45 DAYS FROM THE DATE THIS RELEASE IS PROVIDED TO ME TO CONSIDER IT BEFORE I SIGN AND RETURN IT TO XEROX;
- THAT EVEN AFTER I SIGN AND RETURN THIS RELEASE TO XEROX, I WILL HAVE 7 DAYS THEREAFTER TO CHANGE MY MIND AND REVOKE MY RELEASE BY ASKING XEROX FOR ITS RETURN.

12. I understand and agree that this Release waives all claims I may have at the time I sign it, including claims I do not then know about or suspect. I further understand and acknowledge that California Civil Code, Section 1542 provides: "A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE CREDITOR DOES NOT KNOW OR SUSPECT EXIST IN HIS FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN BY HIM MUST HAVE MATERIALLY AFFECTED HIS SETTLEMENT WITH THE DEBTOR." I waive any rights I may have under that Code section, if applicable, or any other similar state or federal statute or common law principle of similar effect.

Date Release provided to employee: October 24, 2005

Date signed and returned to Xerox: November 23, 2005

By: s/ Kenneth W. Pietrowski
Employee signature

Kenneth W. Pietrowski
Employee Name (Please print)

007103
Xerox Employee Number

General Release
Revised October 24, 2005

APPENDIX G

The Economic Slowdown's Impact on Middle-Aged and Older Americans
Research Report

Jeffrey Love, Ph.D., AARP Knowledge Management
Gerard Rainville, AARP Knowledge Management

June 2008

AARP commissioned a nationwide survey to determine how people age 45 and older are responding to the current economic slowdown. The survey asked a nationally representative sample of 45+ Americans, including an oversample of Hispanic Americans, for their assessments of the economy's condition, whether they have taken actions in response to the changing economy, and if they felt enough was being done to address economic problems. Results show that a majority of respondents believe the economy is in bad shape and that many have adapted their behaviors in response to the floundering economy.

Survey findings include:

* Eighty-one percent of all respondents, and 86% of Hispanic respondents, say the economy is in fairly bad or very bad condition. A similar percentage feel the economy is getting worse.

* Over one-fourth of all respondents, and 41% of Hispanic respondents, said they are having trouble paying their mortgage or rent and one-third have stopped putting money into their retirement accounts. More than one-fourth of all workers and Hispanic workers ages 45+ have postponed plans to retire.

* As the economy slows and prices rise, most middle-aged and older respondents, including Hispanic respondents, report that they are having difficulty

paying for food, gas, utilities, and medicine, and are responding to the situation by cutting luxuries and postponing major purchases and travel.

* Respondents age 65 and over were less likely than those ages 45-64 to report having taken steps to cope with a slowing economy or increasing prices as a result of the recent economic slowdown. This does not indicate that the older population is better off financially. Rather, the data suggest that the 65 and over group had, even prior to the economic downturn, been forced to adjust their spending habits because of their work status, fixed income, and rising costs.

This study is based on a national telephone survey of 1,002 adults ages 45 and older who were currently working, looking for work, or retired. This sample was then boosted to obtain additional interviews with Hispanics, producing an oversample of 400 Hispanics ages 45 and older. The interviews were conducted in English by Woelfel Research, Inc. from April 12 to April 23, 2008. The results are weighted by age and gender. For additional information about the national survey, contact Jeffrey Love, Director of Strategic Issues Research, at 202-434-6279. For information on the Hispanic survey, contact Gerard Rainville at 202-434-6295.

APPENDIX H
Excerpts from Appellants' Brief

07-0418-cv

United States Court of Appeals

for the

Second Circuit

Paul J. Frommert, Alan H. Clair, Donald S. Foote, Thomas I. Barnes, Ronald J. Campbell, Frank D. Commesso, William F. Coons, James D. Gagnier, Brian L. Gaita, William J. Ladue, Gerald A. Leonardo Jr., Frank Mawdesley, Harold S. Mitchell, Walter J. Petroff, Richard C. Spring, Patricia M. Johnson, F. Patricia M. Tobin, Nancy A. Revella, Anatoli G. Puschkin, William R. Plummer, Michael J. McCoy, Larry J. Gallagher, Napoleon B. Barbosa, Alexandra Spearman Harrick, Janis A. Edelman, Patricia H. Johnston, Kenneth P. Parnett, Joyce D. Cathcart, Floyd Swaim, Julie A. McMillan, Dennis E. Baines, Ruby Jean Murphy, Matthew D. Alfieri, Kathy Fay Thompson, Mary Beth Allen, Craig R. Spencer, Linda S. Bourque, Thomas Michael Vasta, Frank C. Darling,

(Caption continued on inside cover.)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK

APPELLANTS' BRIEF

NIXON PEABODY, LLP
Attorneys for Defendants-Appellants
Margaret A. Clemens, *of Counsel*
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Rochester, New York 14603-1051
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litigation. *(Id.)* The inclusion of the "any and all claims" language in the release, as well as these facts, demonstrate that those appellees who chose to sign the releases were fully aware that the release language at issue was intended to include appellees' disputed claims to a recalculation of benefits. There was no need to include, as the District Court suggests, a specific reference appellees' agreement to waive their disputed ERISA claim asserted in this case. (SPA-31).[5]

[5] As the District Court pointed out, a few individuals modified the releases to exclude the claims asserted in *"Frommert v. Conkright"*, and they submitted those altered releases in exchange for salary continuance payments. To the extent that the releases are otherwise deemed to be enforceable on this appeal, appellees will withdraw their objections with respect to these few individuals since Xerox, however, inadvertently, accepted the releases with the carve out.

APPENDIX I

XEROX
MEMORANDUM

Protect until Forever

To
Frances Tobin

From
Mary Ann Mannix

Mgr., HR Operations, XNA Program & Communications
XRX2 - 027; 8*223-1168

Subject
VRIF Request

Date
August 08, 2006

This confirms receipt of your August 7, 2006 request to participate in the NAAO Voluntary Reduction in Force program.

We are unable to accept your application with the change you added to the bottom of page 2 of the Request to Participate and General Release. If you choose, you may resubmit your request without this change prior to the close of the application window at 5:00 p.m. Central time on Thursday, August 24, 2006.

<Original signed by Mary Ann Mannix>

Copy:
F. Tobin File
R. Vescovacci
VRIF Coordinator

APPENDIX J

XEROX

Xerox Retirement Income Guarantee Plan Pension Calculation Statement

Statement Date 01-31-2006

000013
Kenneth W. Pietrowski
28 Pine Brooke Circle
Penfield NY 14526

Your **estimated** pension benefit was calculated based on the information listed below and your earnings, service, and investment results as of January 30, 2006. Changes in earnings, service, investment performance, pension payment start date, beneficiary designation, or other factors could cause a difference in the actual benefit you receive. Prior distributions due to termination or a Qualified Domestic Relations Order will reduce the benefit payable to you.

Your pension benefit was calculated based on the information listed below. Please review this information carefully.

Your Personal Information

Birth Date	08-26-1942
Original Hire Date	08-12-1963

Your Assumptions

Last Day of Employment	11-30-2006
RIGP Pension Payment Start Date	12-01-2006
Age at RIGP Pension Payment Start Date (in years)	64.333333

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Your Pension Benefit Calculation Components

Vesting Service (in years)	43.000000
Benefit Service (in years)	41.500000
Monthly Final Average Pay	$12,057.79

For more detail on the benefit formulas, refer to your Summary Plan Description, "You and Xerox," as provided by the Xerox Benefits Center.

Benefit Formulas

Your monthly 50% Joint and Survivor Annuity retirement benefit is calculated as the greatest of the following formulas:

• 1.0% times Final Average Pay times Benefit Service

• 1.4% times Final Average Pay times Benefit Service (up to 30 years)

• Cash Balance Retirement Account (CBRA) converted to an annuity

• Transitional Retirement Account (TRA) converted to an annuity

Pension Calculation Statement, Page 3

Benefit Comparison

Benefit Formula	Monthly 50% Joint and Survivor Annuity at Normal Retirement Age	Monthly 50% Joint and Survivor Annuity at Pension Payment Start Date	Lump Sum at Pension Payment Start Date
1.4% Formula Benefit	$5,064.27	$5,064.27	$832,626.09
1.0% Formula Benefit	$5,003.98	$5,003.98	$822,713.69
CBRA Benefit	N/A	$3,173.48	$521,757.67
TRA Benefit	N/A	$4,767.16	$783,776.89

Your benefit is calculated by determining the largest total benefit in the first column above and then subtracting the prior distribution in the second column from that amount. Because the 1.4% or 1.0% Formula Benefit produced the largest total benefit, the prior distribution from the next largest benefit (either from CBRA or TRA) is subtracted to arrive at the amount payable.

Because you received a prior distribution, your monthly pension benefit will be reduced by the present value of the prior distribution. Therefore, your monthly 50% Joint and Survivor Annuity at the pension payment start date is $319.99.

Offset of Prior Distribution

Benefit Formula	Lump Sum at Pension Payment Start Date	Offset of Prior Distribution
1.4% Formula Benefit	$832,626.09	$735,536.65
1.0% Formula Benefit	$822,713.69	$735,536.65
CBRA Benefit	$521,757.67	$373,257.44
TRA Benefit	$783,776.89	$735,536.65

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CBRA/TRA Payment Option Information

Following is a list of CBRA/TRA payment options that are available to you based on the assumptions you entered on **January 30, 2006**.

The Single Life Annuity is the automatic payment form if you're single, unless you elect a different payment option. The 50% Joint and Survivor Annuity is the automatic payment form if you're married, unless you elect a different payment option and your spouse consents.

Your actual CBRA or TRA Benefits will be converted to the monthly annuity options listed below based on the interest rate in effect on your pension payment start date. If the interest rate at the time your payment begins is different from the current rate, your monthly annuity options may be higher or lower than the amounts shown below.

Please note that current interest rates have been used for determining the lump sum value of your formula benefits. These interest rates change annually effective January I of each year.

Pension Calculation Statement, Page 5

Your CBRA/TRA Payment Options

Payments as of December 1, 2006	Payable to You	Payable to Your Beneficiary Upon Your Death
LumpSum *This option is a one-time payment.*	$48,240.24	$0.00
Single Life Annuity	$319.99	$0.00
Single Life Annuity with Cash Refund	$294.43	$0.00
50% Joint and Survivor Annuity	$293.41	$146.71
50% Joint and Survivor Annuity with Cash Refund	$292.19	$146.10
50 % Last Survivor Annuity *If your beneficiary dies, your payment/or life will be:*	$316.21 $158.11	$158.11 $0.00
100% Joint and Survivor Annuity	$270.95	$270.95
100% Joint and Survivor Annuity with Cash Refund	$269.96	$269.96

100% Last Survivor Annuity *If your beneficiary dies, your payment/or life will be:*	$270.95 $270.95	$270.95 $0.00
5- Year Certain and Life Annuity *If you die after receiving 5 years of payments, no benefit would be payable to your beneficiary.*	$316.57	$316.57
10- Year Certain and Life Annuity *If you die after receiving 10 years of payments, no benefit would be payable to your beneficiary.*	$307.86	$307.86
15- Year Certain and Life Annuity *If you die after receiving 15 years of payments, no benefit would be payable to your beneficiary.*	$295.61	$295.61

20- Year Certain and Life Annuity *If you die after receiving 20 years of payments, no benefit would be payable to your beneficiary.*	$280.18	$280.18

Pension Calculation Statement, Page 6 .

Excess Benefit Payment Option Information

In addition to the CBRA/TRA Benefit, you are also entitled to receive an Excess Benefit.

Following is a list of Excess Benefit payment options that are available to you based on the assumptions you entered on January 30, 2006.

The Single Life Annuity is the automatic payment form if you're single, unless you elect a different payment option. The 50% Joint and Survivor Annuity is the automatic payment form if you're married, unless you elect a different payment option and your spouse consents.

Pension Calculation Statement, Page 7

Your Excess Benefit Payment Options

Payments as of December 1, 2006	Payable to You	Payable to Your Beneficiary Upon Your Death
Lump Sum *This option is a one-time payment.*	$48,849.20	$0.00
Single Life Annuity	$270.54	$0.00
Single Life Annuity with Cash Refund	$248.94	$0.00
50% Joint and Survivor Annuity	$297.12	$148.56
50% Joint and Survivor Annuity with Cash Refund	$295.89	$147.95
50 % Last Survivor Annuity *If your beneficiary dies, your payment/or life will be:*	$320.21 $160.11	$160.11 $0.00
100% Joint and Survivor Annuity	$274.39	$274.39
100% Joint and Survivor Annuity with Cash Refund	$273.38	$273.38

100% Last Survivor Annuity *If your beneficiary dies, your payment/or life will be:*	$274.39 $274.39	$274.39 $0.00
5- Year Certain and Life Annuity *If you die after receiving 5 years of payments, no benefit would be payable to your beneficiary.*	$267.66	$267.66
10- Year Certain and Life Annuity *If you die after receiving 10 years of payments, no benefit would be payable to your beneficiary.*	$260.28	$260.28
15- Year Certain and Life Annuity *If you die after receiving 15 years of payments, no benefit would be payable to your beneficiary.*	$249.93	$249.93

20- Year Certain and Life Annuity *If you die after receiving 20 years of payments, no benefit would be payable to your beneficiary.*	$236.89	$236.89

Pension Calculation Statement, Page 8

If You're Planning to Start Your Payments Soon

Notify the Xerox Benefits Center

Please notify the Xerox Benefits Center 45 to 90 days before the date you want your pension payments to start.

For More Information

If you need additional information, access the Your Benefits Resources Web site at **http://resources.hewitt.com/xerox** or call the Xerox Benefits Center toll-free at **1-888-979-9961**.
Benefits Center Representatives are available between **9 a.m.** and **6 p.m.**, Eastern time, Monday through Friday. The automated telephone system is available 24 hours a day Monday through Saturday and after **1 p.m.** Eastern time, on Sunday. For TTY, contact your local relay service.

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